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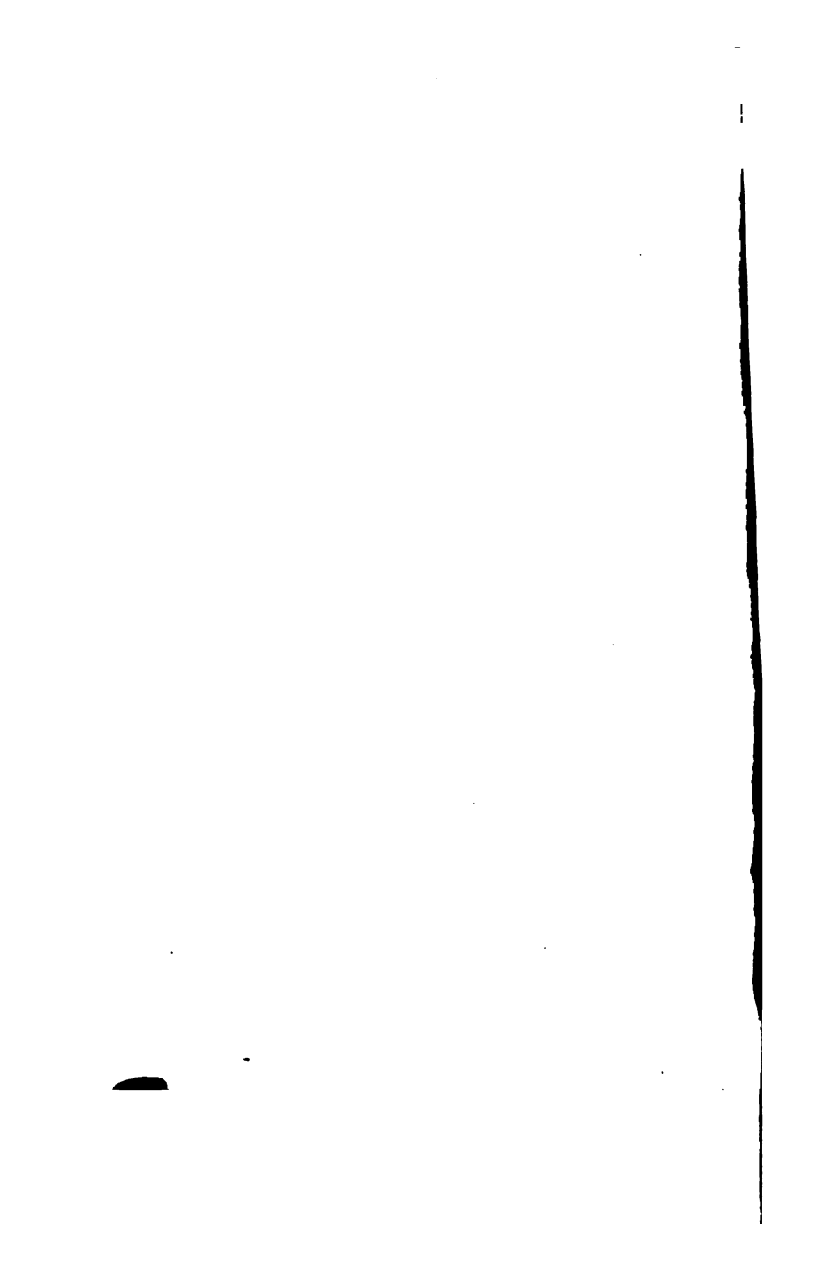
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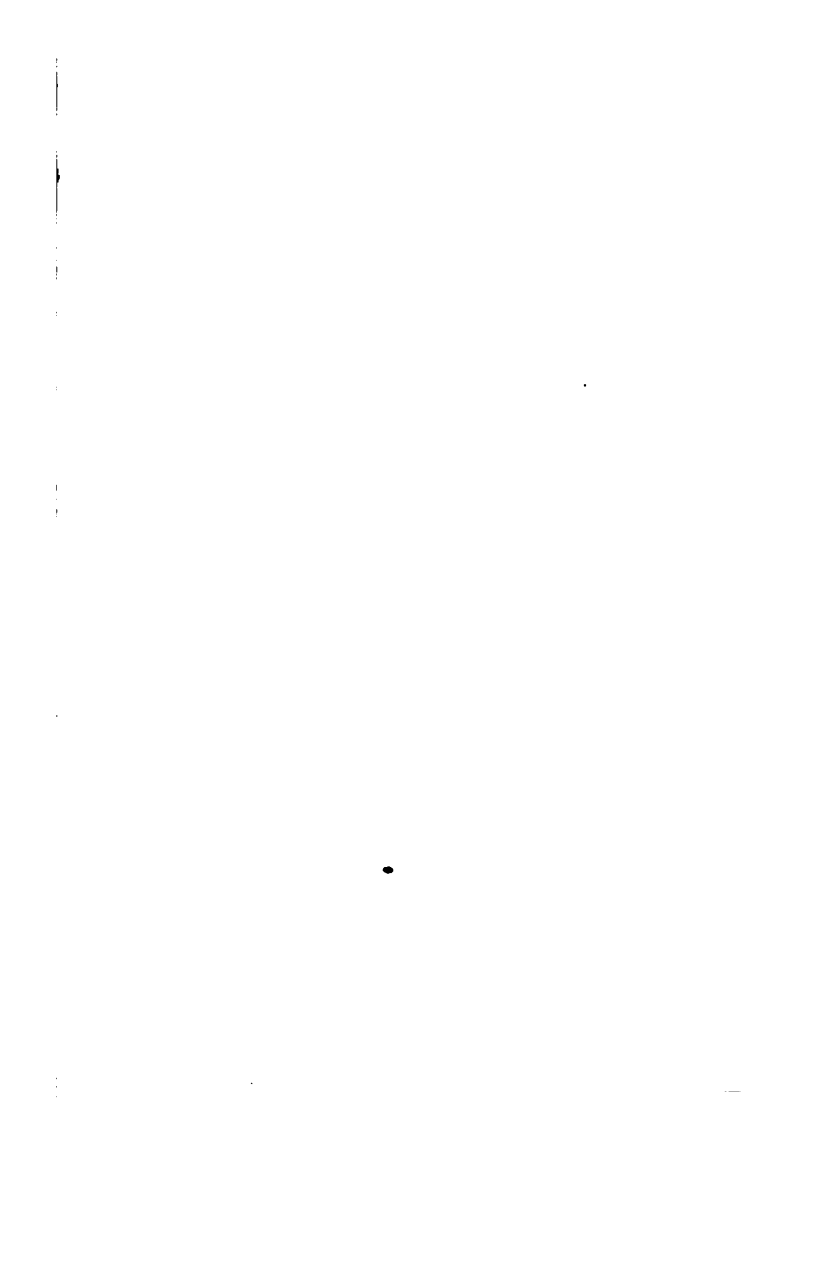
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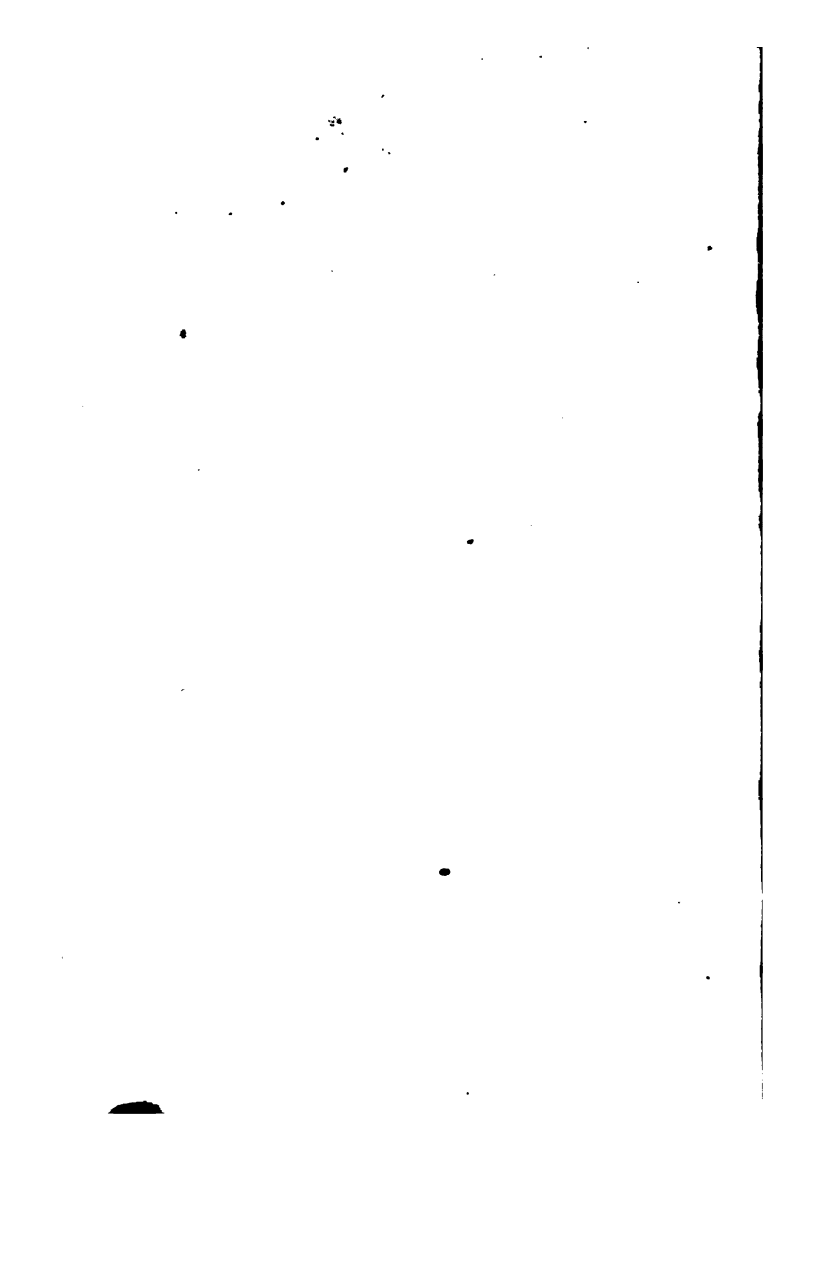


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THE PRACTICE OF SALES

OF

Real Property,

WITH

AN APPENDIX OF PRECEDENTS,

COMPRISING

PARTICULARS AND CONDITIONS OF SALE, CONTRACTS,
CONVEYANCES, ASSIGNMENTS, DISENTAILING DEEDS,
AND EVERY MODE OF ASSURANCE FOR
CONVEYING LANDED PROPERTY.

By WILLIAM HUGHES, Esq.,

OF GRAY'S INN, BARRISTER-AT-LAW.

IN TWO VOLUMES.

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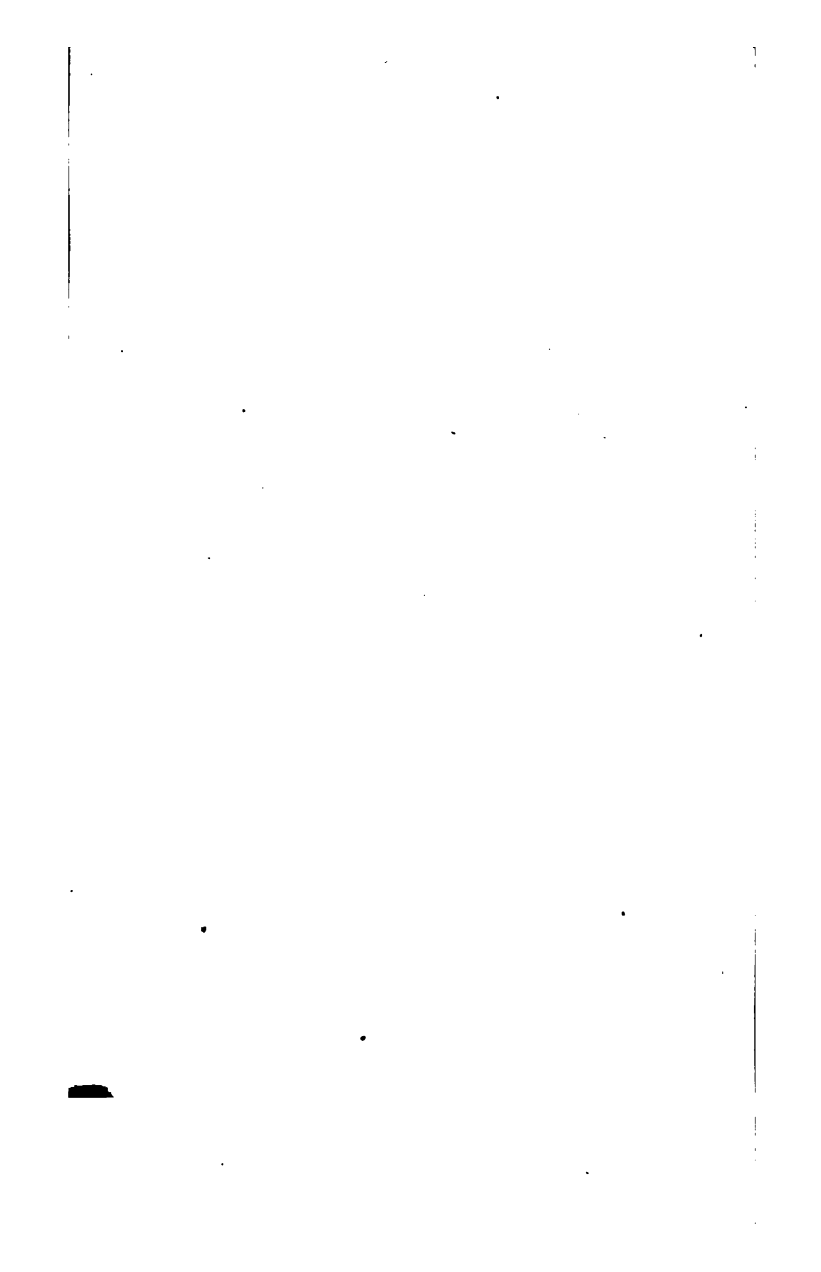
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A PRACTICAL COMMENTARY
ON
THE LAW OF CONTRACTS
RELATING TO
REAL PROPERTY.

CHAPTER I.

**OF TITLES UNDER TENANTS FOR LIFE, FOR
YEARS, AND OF COPYHOLD OR CUSTOMARY
ESTATES.**

**I. ESTATES FOR LIFE, AND ESTATES PUR AUTRE
VIE.**

II. ESTATES FOR YEARS.

- 1. Under-leases, or terms for years.*
- 2. Attendant terms.*

III. COPYHOLD AND CUSTOMARY ESTATES.

SECTION I.

ESTATES FOR LIFE AND ESTATES PUR AUTRE VIE.

**WHENEVER a person takes an estate in real pro-
perty either for his own life or the life of any other**

person, he acquires an estate of freehold, and is in legal strictness styled a tenant for life. But by common speech, where he holds for his own life, he is called tenant for the term of his life, and when he holds for the term of another man's life, he is styled tenant *pur autre vie*. (Litt. s. 56, 381.) The same person may, however, possibly fill both characters, as he may hold for the term of his own life, and also for that of some other person. (Co. Litt. 41, b.) As if a lease was made to A for the term of his own life, and the lives of B and C, in this case A is tenant for life, and though he holds for the lives of several, yet he has but one freehold, viz. a freehold determinable on the death of the survivor of him and his co-tenants. (Ib.) One of the consequences arising from this distinction is, that during the lives of B and C there can be no merger of the freehold into A's estate for life; because, though an estate for a man's own life is, as has been before observed (vol. i. p. 367), greater than an estate for the life of another; yet as A has, in this instance, only one freehold circumscribed by the life of himself and two others, that doctrine does not here apply, as it would most undoubtedly have done if A, who was tenant for life in remainder, had purchased a preceding estate which was determinable on the lives of B and C; because, in the latter instance, there would have been two freeholds, viz. the estate determinable on the deaths of B and C, and A's own life estate in remainder expectant thereon; when, upon the principles before laid down (vol. i. pp. 367—369), the estate *pur autre vie* being the lesser, must have become merged in A's estate for

life, which is the greater estate. (*Brudnell's case*, 5 Co. 9, b; *Rope's case*, ib. 13, a.)

Practical suggestions upon the investigation of titles of tenants for life.—In investigating the titles of tenants for life, the chief points to which the attention should be directed are, first, to see that the estate is properly created; next, that the grantor had the power to create such estate; and then to ascertain that the tenant for life has done no act to create a forfeiture. If a rent is reserved, it must be ascertained that it does not exceed the specified amount; and where the estate is determinable on lives, it must be proved that the lives are still in existence.

That the estate is properly created.—Estates for life, whether of the party himself or *pur autre vie*, being of a feudal nature, were conferred by the same feudal rights and solemnities and the same investiture by livery of seisin as estates of inheritance, and at the present day can only be created or transferred from one party to another by the same modes of assurance as are requisite for passing estates of the latter description. With respect to the expressions necessary to create an estate for life, the most apt and proper way, both in deeds and wills, is to limit the estate to the party expressly for his life; though in a deed (see vol. i. p. 250), and until recently in a will, a general limitation, without mentioning any particular estate, would have passed that interest. (Litt. s. 238; Co. Litt. 42; 1 Roll. Abr. 846; *Pettiward v. Prescott*, 7 Ves. 540.) Yet in some instances, as I shall have occasion to notice hereafter, a life estate *may, in the case of a will*, arise by mere implication, without any words of

express devise, as it may also result in a deed under the operation of the Statute of Uses. And where an estate given to a person generally was made determinable on the happening of some specified event, yet if such event was uncertain, and no fixed time was appointed for the determination of the estate conveyed, it passed a life interest in the property; as where an estate is given to a woman during widowhood, or to a man and woman during coverture, or as long as the grantee should live in a particular house, or should pay 10*l.* yearly to the grantor, but subject to determination upon the happening of the contingencies within the above period. (Co. Litt. 42, a; 1 Roll. Ab. 844, N. pl. 2.)

As to wills.—Until the recent Act (1 Vict. c. 26), a simple devise of landed property to a party by name would have given him a mere life estate, and no more. (*Roe dem. Fox v. Blackett*, Cow. 235; *Denn v. Gaskin*, ib. 657.) Hence where a testator devised Blackacre to his daughter J. in tail, and proceeded, “Item, I devise unto my daughter Whiteacre,” she was held to take an estate for life only in Whiteacre, this being a distinct and independent devise without any reference to that which preceded. (1 Roll. Abr. 369; Moor. 152; Yelv. 209; 1 Mod. 100; 3 Bulstr. 137; see also *Compton v. Compton*, 9 East, 267.) And in a more recent case (*Price v. Archbishop of Canterbury*, 14 Ves. 634), where a devise was as follows: “I give to A my farm and lands at R. to him, his heirs and assigns for ever, and I also give to A my farm and manor of E.” it was held that an estate for life only passed in the manor of E. (See also

Pettiwood v. Cook, 2 Leon. 129; *S. C. Cro. Eliz.* 52; *Woodward v. Glassbrook*, 2 Vern. 388; *Roe v. Holmes*, 2 Wils. 80; *Denn v. Gaskin*, Com. 657; *Roe v. Bolton*, 2 Blackst. 1045; *Right v. Sidebottom*, Doug. 759; *Hay v. Coventry (Earl of)*, 3 T. R. 83; *Goodtitle dem. Richardson v. Edmunds*, 7 T. R. 635; *Doe dem. Child v. Wright*, 8 T. R. 64; *Doe dem. Small v. Allen*, 8 T. R. 497; *Moor v. Denn*, 2 Bos. & Pull. 247.) Unless, therefore, the words of devise imported in substance something more than a mere description of the devised property, an estate for life only would have been held to pass; hence words tending to disinherit the heir would not have been sufficient to have enlarged the terms of a devise which for want of proper words of limitation, or words tantamount, was incapable of passing the inheritance to anybody else. (*Right v. Sidebottom*, Doug. 734.) But now, as to the wills of testators who have died subsequently to 1838, the fee will pass under a simple devise of the property without any words of limitation whatever, unless a contrary intention is expressed by the will (1 Vict. c. 26, s. 27); so that now, so far from words of limitation being essential to pass the fee, they are absolutely necessary to restrict the devise to a lesser interest. But as to wills of testators who died previously to the year 1838, the law remains precisely as it was before; consequently the subject we have been considering must remain an important one for many years to come.

When an estate for life will arise by implication.
—An estate for life may arise by mere implica-

tion of law, without any express words of devise to the party. Thus, where a man devised to his heir-at-law, after the death of his wife, she was held to have taken an estate for life by implication, although nothing was devised to her by express terms; because the intent of the testator undoubtedly was to postpone the heir until after the death of his wife, and if she did not take it, the heir must have done so. (Year Book, 13 Hen. 7; 1 Eq. Ca. Abr. pl. 1; *Smartle v. Scholler*, T. Jones, 98; *Gardiner v. Shelden*, Vaugh. 259; *Falkner v. Falkner*, 1 Vern. 22; *City of London v. Galway*, 2 ib. 572; *Upton v. Ferrers* (Lord), 5 Ves. 804; *Dashwood v. Peyton*, 18 ib. 40; *Aspinall v. —*, 1 Sim. & St. 544; *Doe dem. Driver v. Bowling*, 1 B. & Ald. 722.) And it seems that the same implication arises in the case of a devise to one of several coheirs. (*Hutton v. Simpson*, 2 Vern. 723; *Willis v. Lucas*, 1 P. Wms. 472.) But no such implication would have arisen in case the limitation over on the wife's death had been to a stranger, and in that case the estate in the meantime would have descended on the heir. (*Falkner v. Falkner*, 1 Vern. 22; *City of London v. Galway*, 2 ib. 572; *Upton v. Ferrers* (Lord), 5 Ves. 804; *Aspinall v. —*, 1 Sim. & St. 544.) The implication in favour of the wife would also be rebutted if part of the lands devised to the heir after her death were expressly devised to her for life, and in such case she would take nothing by implication in the remaining lands, the reference to her death being then considered to relate merely to such lands as were before devised to her for life. (*Simpson v. Hornsby*,

Gilb. Eq. Rep. 115, Pre. Cha. 439; *Cook v. Gerrard*, 1 Lev. 212; *Boon v. Cornforth*, 2 Ves. sen. 277; *Dyer v. Dyer*, 1 Mer. 414; *Annandale v. Brazier*, 5 B. & A. 54.) The doctrine of estates arising by implication, it must also be observed, only extends to wills, for in the instance of deeds no such intention will be presumed unless expressed; consequently no estate can possibly arise unless there be a limitation to create it (*Seagood and Hone's case*, 1 Co. 1; *Gardiner v. Shelton*, Vaugh. 261; 1 Eq. Ca. Abr. 196; 2 Lev. 79; *Idle v. Cook*, 2 Lord Raym. 1152), unless, indeed, where it results to the grantor as part of a use that is undisposed of; a subject we will next proceed to consider.

Where an estate for life will result.—It has already been stated (vol. i. p. 341), that where no uses are declared, or as to so much of them as are not declared, they will result back to the original owner. Thus, where A seised in fee covenanted to stand seised to the use of his heirs male, begotten, or to be begotten, on the body of his second wife, it was, upon the principle just alluded to, held by Hale, C. J. and two other justices, that the use being undisposed of during A's lifetime, must, as a necessary consequence, result back to him during that period. (*Pibus v. Mitford*, 1 Ventr. 372.) In *Wille v. Palmer* also (2 Burr. 2615), where there was a limitation of the use for several estates for life and in tail, prior to the limitation to the use of the heirs of the body of the person out of whose estate the uses arose, but there was not any estate for the exact period of the life of that person, it was held that an estate for life resulted to such former owner of the property. But

no estate can result to any person but the owner of the estate out of which the uses are limited to arise. (*Davies v. Speed*, 2 Salk. 679.) Nor can it be implied in favour of that person when he has an estate by express limitation inconsistent with the estate that is alleged to have resulted to him. Hence no such inference will arise where the grantor takes a term of years under the limitation to uses, notwithstanding no use is declared of the freehold until after his death. Thus, for example, where the use was limited to the grantor himself for 99 years, remainder to the use of trustees for 25 years, remainder to the use of the heirs of his own body, remainder to his own right heirs, it was held that no implication could arise contrary to the intent of the conveyance; that there the estate took effect by transmutation of possession out of the seisin of the trustees, and not like *Fenwick* (should be *Pibus*) and *Mitford's* case, where the owner covenanted to stand seised to the use of the heirs of his body; and Powell, J. held, that even in that case, if there had been an express estate limited to the covenantor, it would have been different. (*Adams v. Terre-tenants of Savage*, 2 Salk. 679.) So where A, by marriage settlement, conveyed certain lands to the use of himself for 99 years, if he so long lived, and after to the use of trustees for 200 years, remainder to the use of the heirs male of his own body, remainder to his own right heirs, upon a case referred to the judges of C. B. from the Court of Chancery, they held the limitation to the heirs male of the body of A void, no freehold being limited to any person precedent to that estate; and

that an estate of freehold could not possibly result back to A for life, because another estate, viz. for 99 years, was expressly limited to him, which would be inconsistent with an estate of freehold. (*Rawley v. Holland*, 2 Eq. Ca: Abr. 733.) But where the estate for years is limited to some other person than the author of the uses, then an estate may result back to him; as in *Penhay v. Hurrel* (2 Vern. 370; 2 Freem. 258), where a conveyance was made by A to the use of trustees for seventy years if A should so long live, remainder to trustees for three thousand years, and from and after the death of A to B, his son for life, with remainder over. The objection was, that the limitation to B, together with the remainders over, were void, being an estate of freehold to commence *in futuro*; for the first freehold estate was limited to B, which was not to arise until after the death of A, and no estate for life was limited to A, unless an estate for life should be supposed to result back to him. After solemn argument upon the point, and the case stated to the judges, it was decreed that an estate for life did result to A, and supported the limitation over. (Ferne, C. R. 196.) Yet where the use was expressly limited away during the life of the grantor, instead of for years only, it was there held that there could be no solid ground for contending that any estate resulted back to him. (*Tippin v. Cosin*, Carth. 272; 4 Mod. 380.)

As to estate pur autre vie.—An estate *pur autre vie* may arise either by a person acquiring the interest of a tenant for life, or from the property being limited to him for the life of one or more

persons. The devolution or course in which an interest of this kind is transmissible will depend entirely upon the terms in which such interest is created. If limited to a man and his heirs, or to a man, his heirs, executors, administrators, and assigns, in that case his heirs would be the persons to succeed him in the possession of the property. (*Atkinson v. Baker*, 4 T. R. 229 ; *Sheffield v. Mulgrave*, 531.) If limited to a man and his executors, or simply to the party himself, it will then, upon his decease, devolve upon his personal representatives, and be distributable as personal estate. And if limited or devised for a partial purpose not exhausting the whole interest in the proceeding, as where a life interest is given which determines before the estate *pur autre vie*, it will revert to the grantee or the persons entitled to be his special occupants, and to the executors or administrators if he be not so named. (*Doe dem. Jeffe v. Robinson*, 8 B. & C. 296.) Estates *pur autre vie* were not, however, devisable under the Statute of Wills (32 Hen. 8, c. 1), but they were rendered so by the Statute of Frauds (29 Car. 2, c. 3), by a will signed by the testator, or by some other person in his presence, and by his express direction attested and subscribed by three or more credible witnesses ; and if no devise thereof shall be made, it proceeds to enact, that the same shall be chargeable in the hands of the heir if the same shall come to him by reason of a special occupancy as assets by descent, as in the case of lands in fee-simple ; and in case there shall be no special occupant thereof, that it shall go to the executors or adminis-

trators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. (Sec. 12.) Some doubt, however, having arisen as to whether, upon the construction of the Statute of Frauds, although it was necessary to have three witnesses to a will to pass the legal interest in an estate *pur autre vie*, yet where no special occupant had been named, the personal representatives of the party would have taken by an equity attaching upon them in that character. For the purpose of settling this point the statute 14 Geo. 2, c. 20, was passed, by which, after reciting that such doubts had arisen, it is enacted, "that such estate *pur autre vie*, in case there shall be no special occupant thereof, of which no devise shall have been made according to the Statute of Frauds, shall be applied as personalty." (Sec. 9.) As the latter statute (14 Geo. 2, c. 20), however, only applied to those cases in which there was no special occupant, a question again arose as to whether the personal representatives, having satisfied debts, were compelled to distribute the residue as personalty. (*Westfaling v. Westfaling*, 2 Atk. 460; *Williams v. Jekyll*, 2 Ves. sen. 683; *Atkinson v. Baker*, 4 T. R. 229.) But at length Lord Eldon decided that, after satisfaction of debts, it was distributable as personal estate (*Ripley v. Waterworth*, 7 Ves. 425); and this decision seems to have settled the question. (*Fitzroy v. Howard*, 3 Russ. 225.)

How now devisable.—Estates *pur autre vie* are mentioned amongst the estates and interests devisable under the statute 1 Vict. c. 26, and will pass under a general devise of the testator's real estate. (Secs. 3, 26.)

It must be ascertained that the grantor had power to grant the estate.—In investigating titles to estates for life, it will be necessary to ascertain not only that the assurance which creates it is sufficient for the purpose, but also that the grantor had sufficient power to confer that interest; for such persons as have merely limited interests, as tenants in tail for life or for years, cannot create any estate that will endure for a longer period than their own interest in the premises. It is true if a person was possessed of a long term, as 500 or 1,000 years in lands, and was to grant them to a party for life, the term would be certain to endure longer than the estate so granted; but for all this no estate of freehold could possibly have passed by such grant, unless indeed it had been effected by some tortious mode of assurance, as a feoffment or the like, and then it would have operated as a forfeiture of the term. Where questions upon the validity of life estates most frequently arise, is in the instance of powers contained in marriage settlements and in wills, which renders it necessary in all cases of that nature to scrutinize the instrument by which such power is created, and then to see that all the terms prescribed by such power have been duly complied with.

What acts of a tenant for life will cause a forfeiture of his estate.—The acts of a tenant for life which will cause a forfeiture of his estate are treason and felony; the civil crime of disclaimer; waste; and making tortious conveyances of the property. The subject of forfeiture for treason or felony has been already discussed (vol.i. p.177). A disclaimer,

which may be done by disclaiming to hold of the lord either expressly or impliedly; as by claiming the reversion to himself, or accepting it as a gift from a stranger. (Cru. Dig. tit. 3, ch. 1, s. 38; Co. Litt. 25, b) But a forfeiture thus occasioned may be waived by the subsequent acceptance of rent by the lord, with knowledge of the forfeiture having been incurred. (3 Leon. 271; Co. Litt. 102, a.) Forfeitures by conveying a larger estate than the tenant had in the premises, could only have been incurred where some tortious mode of assurance was resorted to, as a feoffment, fine, or the like, and not when some innocent mode of assurance, as a bargain and sale enrolled, or a conveyance by way of lease and release, was adopted. Fines are, however, now abolished (stats. 3 & 4 Wm. 4, c. 27 & 74); and as the recent enactment of the 8 & 9 Vict. c. 106, s. 4, deprives all assurances of a tortious operation, no mode of conveyance whatever can now create a forfeiture. But causes of forfeiture by tortious conveyances made previously to that Act still remain in force, but will be barred at the end of twenty years. (3 & 4 Wm. 4, c. 27, ss. 2, 3.)

Derivative estates not determinable by the forfeiture or merger of the original estates.—But notwithstanding that an estate for life will be destroyed by forfeiture, merger, or surrender, yet an underlease granted out of such estate will still remain in force; for when it is propounded that derivative terms will cease with the determination of the estate out of which they are derived, this must be understood of their absolute determination by effluxion of time, or a collateral determination, as in the in-

stance of a lease to A for ninety-nine years, if he shall so long live; or by a condition annexed by the parties to the original estate. (*Webb v. Russell*, 3 T. R. 393; 2 Prest. Convey. 135.)

Waste.—The Statute of Gloucester (6 Ed. 1, c. 5) enacts that a tenant for life, or years, by curtesy, or in dower, shall forfeit the thing he has wasted; upon the construction of which statute it has been determined that the thing wasted means the property upon which such waste has been committed. (2 Inst. 20; F. N. B. 139.) Still, in spite of this doctrine, proceedings for the forfeiture in case of waste have long since become obsolete, the modern remedy being an action upon the case by the reversioner to recover damages (*Gibson v. Wells*, 1 Bos. & Pull. 290; *Harrow School v. Alderton*, 2 Bos. & Pull. 36); and an injunction in equity to restrain further injury. (Co. Litt. 23, b; *Abraham v. Bubb*, 2 Freem. 63, 278; *Williams v. Day*, 2 Cha. Cas. 32; *Whitfield v. Bewett*, 2 P. Wms. 242; *Clark v. Thorpe*, 2 Ves. 233; *Robinson v. Litton*, 3 Atk. 211; *Hanson v. Gardiner*, 7 Ves. 310.) But a tenant for life, without impeachment of waste, although it was formerly considered that he was only exempted from the penalties of the Statute of Gloucester (6 Edw. 1, c. 5), yet as long since as *Lewis Bowles'* case (11 Rep. 79) was determined, it was considered that the clause, without impeachment of waste, gave the property itself. (*Alston v. Alston*, 2 Ves. 265, 266.) Still, for all this, courts of equity will grant an injunction to restrain a tenant for life from the commission of any waste that is likely to be of permanent injury to the inherit-

ance. (*Vane v. Barnard* (Lord), 2 Vern. 738; Pre. Cha. 454; 1 Ves. 625; *Abrahall v. Bubb*, 2 Freem. 53; *Perrot v. Perrot*, 3 Atk. 95; *Robinson v. Litton*, 3 Atk. 210.) The acts which a court of equity has restrained a tenant for life, without impeachment of waste, from committing, are the cutting down of ornamental timber (*Packer v. Bolingbroke*, referred to 1 Mad. Pr. 141; *Packington v. Packington*, 3 Atk. 215; *Aston v. Aston*, 1 Ves. 264; *O'Brien v. O'Brien*, Amb. 107; *Strathmore v. Bowes*, 2 Bro. C. C. 88); and all timber planted for ornament must be so considered (*Mohun* (Lord) *v. Stanhope* (Lord), Rolls, 9 March 1808, 1 Mad. Pr. 143); and this, even if planted for that purpose by the tenant for life himself. (— *v. Copley*, referred to 1 Mad. Pr. 144.) The circumstance, however, of timber being ornamental to the property, will not of itself be sufficient to constitute what in the eye of a court of equity is considered ornamental timber; to render it so, it must be planted for that express purpose; such as vistas or avenues, or trees planted for the purpose of excluding objects from view. (*Burgess v. Lambe*, 16 Ves. 183; *Day v. Merry*, ib. 375; *Coffin v. Coffin*, 1 Jac. 70.) In other respects, a tenant for life unimpeachable for waste, may cut down timber generally, treating it in a husbandlike manner, with regard to the beauty of the place (*Burgess v. Lambe*, 16 Ves. 185); still this will not empower him to cut down trees that have not arrived at a proper degree of maturity, though he may doubtless thin them in such a manner as to assist the growth of the rest. (*Perrot v. Perrot*, *sup.* 1 Mad.

Pr. 144.) A tenant for life, without impeachment of waste, may be restrained from opening mines or quarries (*Whitfield v. Bewet*, 2 P. Wms. 242; *Tracey v. Hereford*, 2 Bro. C. C. 128); but not from working mines or quarries already opened. (*Saunders's case*, 5 Rep. 12.) And even new pits may be opened for the purpose of working old mines. (*Clavering v. Clavering*, 3 P. Wms. 388.) An injunction will also be granted to restrain a tenant for life from pulling down houses (*Vane v. Barnard* (Lord), 2 Vern. 738), or suffering them to remain uncovered. (*Abrahall v. Bubb*, 2 Freem. 53.)

What persons are considered in the same light as tenants for life.—A tenant in tail, after possibility of issue extinct, is looked upon in the same light as a tenant for life without impeachment of waste, for it is impossible that under any circumstances his estate can endure beyond that period. (*Bowles v. Bertie*, 11 Rep. 84; *Abrahall v. Bubb*, 2 Freem. 53, 278; *Williams v. Day*, 2 Cha. Cas. 32; *Williams v. Williams*, 12 East, 221; 15 Ves. 427.) The estate of a tenant by the curtesy is even more limited than this, for he is considered as an ordinary tenant for life, liable to impeachment for waste, and subject to all the incidents of a simple life estate; as is also the interest of a tenant in dower. (3 Rep. 23, b; Co. Litt. 53, a.)

It must be ascertained that the lives are still living.—One of the most important points connected with the sale of leasehold property, dependent on lives, is to ascertain whether or not such lives were in existence at the time of signing the

contract. Too strict an inquiry cannot be made in cases of this description, because if any of the lives should happen to drop after signing the contract, and before its completion, the loss must fall upon the purchaser. In *White v. Nutt* (1 P. Wms. 61), however, Lord Keeper Wright seems to have considered, that although where some of the lives dropped between the contract and the conveyance, the loss must be borne by the purchaser; yet that, if all the lives had dropped, it might have been otherwise, for that then, no estate being left, there could be no conveyance. In coming to this conclusion he seems to have lost sight of the principle by which cases of this kind are governed, viz. that in equity, that which was agreed to be done is considered as already performed; for hence it is, that, as soon as the agreement is signed, the purchaser must stand by the profit and loss of his bargain. If a person were to sign a contract for the purchase of real property upon which a rich mine was afterwards discovered, he would be entitled to the full benefit of it, and though the value of the estate might be thereby increased one hundred fold, the vendor would neither be entitled to rescind the contract on that account, nor to obtain one penny in addition to his purchase-money. So upon the same principle the purchaser must bear all intermediate losses; and therefore if the property be overwhelmed by an inundation, consumed by fire (*Pain v. Mellor*, 6 Ves. 349; *Ex parte Minor*, 11 Ves. 562); or swallowed up by an earthquake, he must equally abide the loss. (*Cass v. Rudele*, 2 Vern. 280. See also *Minchin v. Nance*, 4 Beav.

332, 341 ; and see also *Foster v. Deacon*, 3 Mad. 394 ; *Binks v. Lord Rokeby*, 2 Swanst. 222 ; *Ferguson v. Tadman*, 1 Sim. 530 ; *Lord — v. Stephens*, 1 You. & Coll. 222.) The same rule applies in like manner to the dropping of lives, such being one of the casualties to which property depending on lives is subject : so that whether one or all the lives die in the interim between the contract and the conveyance, the purchaser must be the losing party ; and though a conveyance be unnecessary, he will not thereby be released from the payment of the purchase-money.

Evidence of existence of lives.—It is enacted by the statute of 19 Car. 2, c. 6, s. 2, “ that if such person or persons, for whose life or lives such estates have been or shall be granted, shall remain beyond the seas, or elsewhere absent themselves in this realm, for seven years together, and no sufficient proof be made of their lives in any action for the recovery of such tenements by the lessors or reversioners, in such case they shall be accounted dead, and the judges shall direct the jury to give their verdict accordingly.” Upon the construction of this section of the statute, it has been holden that the fact of a tenant for life not having been seen or heard of for fourteen years by a person residing near the estate, although not a member of the family, is *prima facie* evidence of the death of the tenant for life. (*Doe dem. Lloyd v. Deakin*, 4 Barn. & Ald. 433 ; and see *Doe dem. Jesson v. Jesson*, 6 East, 85.) The fifth section of the above-mentioned statute, however, contains a proviso, “ that if any person or persons shall

be evicted, and afterwards such person shall return, or shall, on proof in such action aforesaid, be made appear to be living, or to have been living at the time of eviction, that then and from thenceforth the tenant or tenants who were ousted of the same, his or their executors, administrators, or assigns, may re-enter, re-possess, have, hold, and enjoy, the said lands or tenements in his or their former estate, during the life, or for so long term as the said person upon whose life the said estate or estates depend shall be living, and shall, upon action brought by them against the lessors, reversioners, tenants in possession, or other persons respectively, who since the said eviction received the profits of the said lands or tenements, recover for damages the full profit thereof, with lawful interest from the time he or they were ousted and kept out of the said lands or tenements; and this as well in the case where the said person upon whose life such estate or estates did depend, are or shall be dead at the time of bringing such action as if they were living." By the statute 6 Anne, c. 18, also "any person claiming any estate in remainder, reversion, or expectancy, after the death of any person within age, married woman, or any person whatever, may apply to the Court of Chancery, and procure an order for the production of such person, and upon refusal, such person shall be taken to be dead; but if in any action such person shall appear to have been living, the party ousted may re-enter and recover damages for the profits during the time of such ouster."

Estates pur autre vie not liable to dower or curtesy.—Estates *pur autre vie*, notwithstanding they may be limited to a man and his heirs, even with a perpetual right of renewal, are not considered in the light of estates of inheritance; consequently neither dower nor curtesy can possibly arise out of them.

SECTION II.

ESTATES FOR YEARS.

1. *Leases.*
2. *Under-leases.*
3. *Attendant terms.*

1. *Leases.*

IN titles of leasehold property the first point to which the attention should be directed, is to see that the original lease is good and perfect, and capable of creating the term. In order to be satisfied upon this important head, it must be ascertained, 1. That the lessor had the power to grant the lease. 2. That the lessee was of capacity to receive the lease. 3. That the lease itself is a valid instrument, containing the proper operative words; a sufficient description of the property; and creates the duration of interest which is professed to be granted. 4. That the reserved rent does not exceed the specific amount. 5. That the lease contains no burdensome covenants, stipulations, or provisoes restricting the lessee from the due enjoyment of the demised property. And, 6. That the lessee has done no act to amount to a surrender, merger, or forfeiture of his term. These observations can, however, only relate to the root or origin of the term, for where there have been any meane assignments, wills, under-leases, or other dealings with the property, every one of these transactions must be strictly investigated, and every document re-

lating to them inspected. So where leases have been renewed, it will be requisite to see that the surrenders have been properly made; nor will this alone suffice, for the lessor's title subsequent to the original grant of the term will also require investigation, because any mesne incumbrance affecting the reversion would attach upon the new lease. (*Coppin v. Fernyhough*, 2 Bro. C. C. 291.) And where the contract is for the purchase of renewable leaseholds, it must be ascertained either that a tenant-right of renewal has been established by custom, or that the lease creating the term contains the proper stipulations and covenants for renewal.

I. *That the Lessor has Power to grant.*

A purchaser of leasehold property is as much a purchaser, as far as that interest extends, as one who contracts to buy an estate in fee-simple, and cannot, therefore, be compelled to complete his purchase unless the vendor can produce such a title as will insure him the uninterrupted enjoyment of his term. (*Hodgkinson v. Wood*, 6 Law T. 451.) It will not, therefore, be enough, that the vendor produces the original release, and deduces a good title through all the mesne assignments; for, before he can compel the purchaser to a specific performance of the contract, he must shew such a title in the lessor as would enable him to create the term. This question was for a long time one of those points which, though continually discussed, still remained undecided, yet it is now settled that a vendor of a term cannot compel a specific performance unless he can shew a good title in his lessor (*Rosewell v. Vaughan*,

Cro. Jac. 196; *Lysney v. Selby*, 2 Lord Raym. 1118; *Keech v. Hall*, Doug. 21; *Waring v. Mackerth*, 11 Ves. 343; *Fielder v. Hooker*, 2 Mer. 424; *Purvis v. Rayer*, 9 Price, 488; *Souter v. Drake*, 5 B. & Ad. 992), except in those cases where the purchaser was, at the time he entered into the contract, aware of the vendor's inability to do so (*Spratt v. Jeffery*, 10 B. & C. 249); or there is a stipulation that the purchaser shall not require the lessor's title; but even then, if he could shew that the vendor had not such an estate or authority as would have enabled him to grant the lease, he would not be compelled to fulfil his contract. (*Shepherd v. Keatley*, 1 Cro. Mees. & Ros. 117.) But it would not afford a sufficient ground for rescinding the contract to shew that there was a flaw in the vendor's title, consisting of an unreleased incumbrance, which left the legal estate outstanding. (*Duke v. Barnett*, 2 Coll. 337.) Thus the law appears to stand with respect to the vendor; but in the case of a purchaser seeking a specific performance, it still remains undecided whether, although he may rescind the contract for want of it, he has at the same time any right to insist upon the vendor producing his lessor's title; and, notwithstanding the question arose in one or two cases that came before Lord Eldon, he could never be prevailed upon to decide the point, but he seems to have inclined to the opinion, that, in the absence of an express stipulation to the contrary, the purchaser had a right to call for the lessor's title. (*White v. Foljambe*, 11 Ves. 337; *Radcliffe v. Warrington*, 12 ib. 326; *Deverall v. Bolton*, 18 ib. 505.)

Rule as to lessor's title does not affect bishop's leases.—The rules above laid down respecting the production of the lessor's title do not apply to bishop's leases. This subject was very fully and ably discussed in the case of *Fane v. Spencer*, a short report of which may be found in a note to 2 Mer. Reports, 430. In that case an objection was taken by the defendant, the purchaser of an estate held on a lease for lives under the Bishop of Bath and Wells, on the ground that it was not shewn by the abstract, or otherwise, that the bishop had any right to make the lease under which the plaintiff, the vendor, derived his title. The abstract commenced with a lease from the then bishop in 1763, since which the title was regularly deduced to the plaintiff. There was no condition in the particulars of sale that the purchaser should not require, nor the vendor be bound to produce, the title of the ground landlord. The Master, on a reference, reported in favour of the title, and exceptions being taken to the report on the above grounds, they were argued at several times before the Vice-Chancellor. At last his Honour overruled the exceptions, on the ground that this was the case of a bishop's lease, and therefore distinct from the question which arises on ordinary leases, the statute prescribing the mode of granting, and the presumption arising from the use of the bishop's seal being equivalent to that which is founded on admission in the case of a copyhold. And even in the case of an ordinary lease, where a party had previously contracted for the purchase of the benefit of an agreement for the

letting of a public-house, and also of the stock and good-will, and he entered into possession before the lease had been granted, paid part of the purchase-money, and mortgaged his interest, it was held that after this mode of dealing he was not entitled to call for the production of the lessor's title, or for evidence that the lease was made in conformity with the power under which it was granted. (*Haydon v. Bell*, 1 Bea. 642.)

Title to leaseholds will not depend wholly on lessor's ownership.—The title to leasehold property will not in all cases depend upon the ownership of the lessor; for it may also depend, either wholly or in part, on a power vested in such lessor, and, in the latter instance, the goodness of the lease will rest entirely upon the validity and due exercise of the power under which it is created (2 Prest. Conv. 135); as, for example, in the instance of leases granted by tenant in tail under the stat. 32 Hen. 8, c. 28, which empowers him to grant leases for three lives or twenty-one years, which will be binding on the issue in tail, but not on those in remainder or reversion. Now, in order to render such a lease valid, the terms of the statute must be strictly complied with. These require that the lease shall be made by indenture; that it shall begin presently, and not in *futuro*; and that it must be *either* for three lives, *or* twenty-one years, but not for both; yet it may be for a shorter period than either the three lives or the twenty-one years, and would therefore be good if made for two lives, or even one, or for fifteen, ten, or any lesser number of years within the period prescribed by the statute (*Harris v. Zouch*, 1 Keb.

347; *Briers v. Boulton*, 3 ib. 745; *Zouch dem. Woolston v. Woolston*, 2 Burr. 1146; *Isherwood v. Olknow*, 3 Mau. & Selw. 382); and a power to grant leases for lives will confer an authority to grant them during the life of the survivor (*Baugh v. Haynes*, Cro. Jac. 76; *Alsop v. Pyne*, 3 Keb. 44; *Doe v. Halcombe*, 7 T. R. 13; *Doe v. Hardwicke*, 10 East, 549); which, after all, amounts to nothing more in fact than the power itself expresses; because for three lives generally, or for three lives and the longer liver of them, is all one; since without any such expressions it must have enured to the survivor. (Woodf. Land. and Tenant, 125, 2nd edit.)

Power confined to corporeal hereditaments.—This leasing power, it must be observed, is confined to corporeal hereditaments, and does not extend to tithes, rent-charges, or the like. The lands also must have been letten for above half the time, or eleven years out of the twenty (2 Blac. Com. 319), either for life, or years, at will, or by copy of court roll. And if there be an old lease in being, it must be first absolutely surrendered, or be within a year of expiring. Another requisite is, that the most usual or customary rent for twenty years be reserved, and also that the lessees be not made dispunishable for waste.

What will be considered as the usual or customary rent.—With respect to what is to be considered as the usual or customary rent, Lord Holt says that it means the rent which was reserved, when the power was created if a lease were then in being, or that which was last reserved, if no lease was in

being. (3 Cha. Rep. 645.) Lord Cowper, however, suggested that if lands were leased once at a greater, and twice at a lesser, rent, he should consider the rent of the former lease to be the ancient rent; for the last might be by the person who had the fee, who would not be bound to reserve the ancient rent, but might let it for nothing if he pleased. He also said that this rule could not apply to lands anciently demised, where fines had been taken; for there the rents were more or less in proportion as the fines were higher or lower. (4 Com. Dig. 192; Watk. Conv. by Merifield, 365.) The rent, also, which is reserved, must be the rent of the property of which the lessor is so seised in tail, and not of that and any other kind of property; for if a tenant in tail reserve an entire rent upon a farm, in which some leasehold and fee-simple tenements are mixed with the entailed lands, the lease will not be a valid one within the statute. (*Rees and Parkin v. Philp*, Wight. 69.)

Leases under statute 32 Hen. 8, how determinable.—But notwithstanding that a lease under the statute 32 Hen. 8, would have become determinable by the failure of issue inheritable under the entail, they are not to be considered as terms for a given number of years if the tenant in tail shall so long live, and the heirs of his body so long continue, but should be treated and assigned as absolute interests, and in fact would actually have become so to all intents and purposes, and have been equally binding and conclusive on the remainder-men and reversioner, as on the tenant in tail himself and his issue, in case the tenant in tail had suffered a recovery

(Dy. 51, 6; in marg. Bac. Abr. Lease, D; 2 Prest. Conv. 131); and the same effect, it is apprehended, would now be produced by an assurance under the Fine and Recovery Substitution Act (3 & 4 Wm. 4, c. 74), if such assurance was capable of barring the ulterior limitations to take effect after or in defeasance of such estate tail (secs. 15, 19).

Voidable lease by tenant in tail, how far personally binding.—Although a term granted by a tenant in tail to commence at a future day is an invalid lease within the statute of 32 Hen. 8, still, if it be limited to commence during the lifetime of the tenant in tail, it will not only be personally binding on the lessor, but also upon his alienee, upon a husband tenant by the curtesy, or wife tenant in dower (*Bedford's case*, 7 Co. 72; Bac. Abr. Lease D; Dy. 46, 6; 2 Prest. Conv. 132); and even as far as regards the issue in tail, the lease will only be voidable, and not actually void, and may therefore be confirmed by them. But if the term be limited to commence after the death of the tenant in tail, it will be absolutely void, and thus incapable of confirmation. (*Jones v. Verney*, Willes, 169; *Doe v. Watts*, 7. T.R. 82.)

Leases under ordinary powers.—Leases under the usual and ordinary powers of leasing can only be made in pursuance of the terms prescribed by the power. Still, for all this, a power to lease for lives or years may be well executed by a lease, either absolutely for certain lives, or a certain number of years, or conditionally for a number of years determinable on a life or lives. (*Commons v. Marshall*, 6 Bro. P. C.

168.) So also, as I have just before remarked, where one was empowered to make leases for the lives of three persons, it enabled him also to lease during the life of the survivor; yet a power to make a lease for three lives was held not to be well executed by a lease for ninety-nine years determinable on three lives; the reason of which was, that the estate demised did not pursue the terms of the power, which was to grant a freehold lease, whereas that which was actually demised was a mere chattel interest (*Paine's case*, 8 Co. Rep. 69, 70, 6; *Rattle v. Popham*, Str. 992; Woodf. Land. and Tenant, 125, 4th edit.); nor will a person be allowed to exceed the extent of his power; consequently if a person has a power to lease for twenty-one years, this does not authorize him to lease for twenty-six, and if he were to do so, the lease would be absolutely void at law (Fitz. 157; Hard. 398; *Parry v. Brown*, 2 Freem. 171; 3 Cha. Rep. 310; *Roe dem. Brune v. Prideaux*, 10 East, 158); but in equity it is only void as to the excess, and will therefore be sustainable in that court as an effectual exercise of the power for the twenty-one years. (*Campbell v. Leach*, Ambl. 740; *Commons v. Marshall*, 7 Bro. P. C. 111.) Yet although equity will treat the term as good *pro tanto*, where it exceeds in point of duration the limit prescribed by the power, it will not extend the principle so far as to support a lease which is void at law, on account of containing stipulations, provisoes, or covenants wholly unwarranted by the power. Thus, where a tenant for life was empowered to grant leases to contain usual and reasonable covenants, and a cove-

nant was contained in the lease that in case the premises were blown down, or burnt down, the lessor should rebuild, or the lessee might quit; the tenant for life having died, the remainder-man brought an ejectment against the lessee, on the ground that this was a covenant not usual and reasonable: and the jury on the trial having found that such was an *unusual and unheard of covenant* on the part of the lessor, the lessee was evicted. The latter afterwards filed his bill in the Court of Exchequer against the remainder-man to have the unusual covenant struck out of the lease, but the Court dismissed the bill.

Where the lessor has a power and also an interest in the demised premises.—It has sometimes happened that where a person has had both a power of appointment over, and also an interest in, the property, he has granted a lease for a term absolute, without in any way referring to his power. Now it seems that in a case of this kind if his interest is such as independently of the power to enable him to grant such a lease, the term will be held to pass out of his interest and not by force of the power. But if, on the other hand, he creates a term which may in point of duration exceed his interest in the property, as in the instance of a tenant for life with a power to grant leases, granting a term absolute without referring to his power, it would be construed to operate as an execution of his power. (*Rogers's case*, 1 Ventr. 228 cited; *Leicester's (Earl of) case*, ib. 278; *Thomlinson v. Dighton*, 10 Mod. 31; *Campbell v. Leach*, Amb. 740.) Yet if a person has both a power and an interest over different estates, and reciting his power over one of

the estates, he executes it in a formal manner, and then merely recites that he is seised in fee as to the other estate, without in any way referring to his power, and conveys accordingly, the former estate would of course pass by force of his power, but the latter would pass out of his interest; because there is no apparent intention to execute the power as to that portion of his property. (*Maundrell v. Maundrell*, 7 Ves. 567; 10 ib. 246; *Roe dem. Berkeley v. Archbishop of York*, 6 East, 86; *Boughton v. Sandelands*, 3 Taunt. 342; see also *Adney v. Field*, Ambl. 654.)

Where the power is limited to leases in possession.—It has been decided that a general power of leasing, without expressing that the leases shall be only in possession, will not authorize the granting a lease in reversion or *in futuro*. (*Suffolk (Countess of) v. Wroth*, Cro. Eliz. 5; *Shecomb v. Hawkins*, Cro. Jac. 318; *Opie v. Thomassins*, 1 Lev. 267; *Bucks v. Antrim*, Sid. 101; *Doe v. Cavan (Lady)*, 5 T. R. 567; *Doe dem. Allen v. Calvert*, 2 East, 367; *Bowes v. Waterworks Company*, 3 Madd. 375.) But a lease to commence from the date, or the day of the date, will be considered as a lease in possession. (*Clayton's case*, 5 Rep. 1; *Higham v. Coles*, 2 Roll. Abr. 251; *Pugh v. Leeds (Duke of)*, Cow. 714.) In several cases, also, in which the subject has been discussed, the judges have expressed an opinion, that if there be a power to grant leases generally, a concurrent lease to commence immediately will be valid, provided the estates for life or years limited in all the leases, do not exceed the number of lives or

years allowed by the power, although the lands are then held under an existing lease made either by a former proprietor or the person making such lease. (*Berry v. Rich*, Hard. 412 ; *Read v. Nash*, 1 Leon. 147 ; *Goodtitle v. Fumcan*, Doug. 565.) Still, notwithstanding the *dicta* above mentioned, the actual point does not appear to have been ever determined, and it appears, to say the least of it, to be exceedingly doubtful, if the question should again arise, whether the concurrent lease would be supported. Yet, however doubtful this point may be, it appears that if the lessor were to grant a second lease to the former lessee, in such case the acceptance of the second lease would operate as a surrender of the first, and then the second would take effect as a lease in possession, and not as one concurrent with the pre-existing term ; and if the old lease should be surrendered, there can be no doubt but that a fresh lease might then be granted to take effect in possession.

What will be embraced under the terms usually letten.—In order to restrain a tenant for life from leasing the mansion-house and grounds usually occupied by the proprietors of the estates, it is a common practice, both in wills and marriage settlements, to restrict the power of leasing to such lands as have been usually demised or letten, upon which a question frequently arises as to what is to be construed as the true and literal meaning of those terms. It seems, however, that they will comprehend every species of demise, whether it be at will from year to year, or for years or lives, or whether it has been granted by parol or by deed,

by copy of court-roll, covenant to stand seised, or by any other mode of assurance. (Co. Litt. 44, b; *Baugh v. Haynes*, Cro. Jac. 76; *Right v. Thomas*, 1 Black. 446; S. C. 3 Bur. 1441.) Lands which have been demised twice have been considered as lands usually let (1 Roll. Abr. 261, pl. 11, 12; Vaugh. 33), but not those which have been only once demised. (2 Roll. Abr. 262, pl. 13.) And even where lands have been demised many years ago, but have not been recently let, as within the space of the last twenty years or upwards, they would not be considered as coming under the description of lands usually demised. (*Tristram v. Baltinglass (Lady)*, Vaugh. 31; 2 Freem. 23.) In investigating titles of leases where the title depends upon a question of this kind, it will be necessary to ascertain by old leases, or other satisfactory evidence, that the lands have been usually demised previously to the granting of the lease; for unless this can be shewn, the title will be clearly unmarketable.

What will be considered as the best rent.—What is to be considered as the best rent, within the meaning of that term in a leasing power, is often a perplexing and yet most important question, for upon this the lease must often be supported or fall to the ground. (*Wright v. Smith*, 5 Esp. N.P.C. 203.) The proper construction, however, seems to be that where the power is so restricted it means the best rack-rent that can reasonably be obtained by a landlord, at the same time taking into consideration all the requisites of a good tenant who will manage the estate in a husbandlike manner.

(*Doe dem. Lawton v. Radcliffe*, 10 East, 278; *Queensbury leases case*, 5 Dow. 343; 1 Bligh, 427; *Selsey (Lord) v. Rhoades*, 2 Sim. & Stu. 41.) There is but one criterion which our Courts always attend to as a leading criterion in discussing the question whether the best rent has been got or not, that is, whether the man who makes the lease has got as much for others as he has for himself; for if he has got more for himself than for others, that affords decisive evidence against him. (Per Lord Eldon, 1 Bligh, 247.) If, therefore, a fine be taken upon granting the lease, it must, for the very reason just laid down, avoid the lease, because, however considerable the rent may be, it might have been greater if the fine had not been received, and which at any rate gives more to the party taking it than the rent, which is all that those coming after him will be entitled to receive. It has, however, been held that covenants by the tenant to repair and to improve, or expend money for that purpose, though it may have the effect of lessening the actual amount of rent, still, as the property will receive a corresponding advantage, it will not invalidate the lease. (*Shannon v. Bradstreet*, 1 Sch. & Lef. 52; *Doe dem. Bettison*, 12 East, 305; *Coxe v. Davy*, 13 ib. 118.)

Time at which rent should be made payable.—

With respect to the time at which the reserved rent should be made payable, it seems that where the power requires the rent to be made payable yearly, this will not restrict the lessor from making it payable half-yearly, or quarterly. (*Campbell v. Leach*, Ambl. 740; *Doe v. Wilson*, 5 B. & Ald. 363.)

But the rent cannot be made payable after the appointed day.

Provisoes for re-entry.—In leasing powers it is usual to direct that the leases shall contain a covenant on the part of the lessee for payment of the rent, and also a proviso for re-entry in case of his default in so doing within a stipulated number of days after it shall have become payable. In certain instances, however, the clause of re-entry has been stated generally, upon which a question has been raised as to whether the proviso for re-entry in the lease should not be made immediate upon non-payment of the rent at the appointed days of payment, and whether, if the time be extended to the usual period of twenty-one days, it would not invalidate the lease on account of its not having pursued the terms of the power. But whatever doubts may have once existed, it seems at last to be settled that a reasonable time may be inserted without infringing upon the requisitions of the power, and although the Court of Exchequer not long since held that where a power required a proviso for re-entry on non-payment of the rent generally, the power was not well pursued by a proviso for re-entry, if the rent was in arrear for fifteen days (*Doe dem. Jersey v. Smith*, 2 Bro. & Bing. 473), the House of Lords reversed the decision, and held that the power was well executed. (2 Bligh, 290; see also *Doe v. Wilson*, 5 B. & Ald. 363.)

That the lessee shall not commit waste.—It is also usual to insert in leasing powers that the lessee shall not be made dispunishable for waste. Under this clause a lessor cannot empower the lessee to

work unopened mines, but he may authorize him to work those already open, and in due course of working. Neither will it authorize the lessor to permit the lessee to pull down buildings, or in fact to do any of those acts which the law considers as waste, and which acts, in themselves apparently trivial, may sometimes constitute, for even destroying a border of box appears to have been so considered. (*Empsom v. Soden*, 4 B. & Ad. 655; 1 Nev. & Man. 720.) In the case of a power to grant building leases a greater degree of latitude will be allowed, and therefore, although in other leases a lessee, liable to impeachment of waste, would not be authorized to pull down buildings, yet in a building lease the main object of the power could not be carried into effect, unless the lessee could pull down the old buildings to make way for the new ones. (*Jones v. Verney*, Willes, 169.)

Direction that lessee shall execute a counterpart.—Another common stipulation annexed to a power of leasing is that the lessee shall execute a counterpart, and where this occurs, the validity of the lease itself will depend upon this condition being complied with. This can usually be shewn by a memorandum indorsed on the lease, which, if signed by the lessor, will afford sufficient evidence of that fact. But in case this has not been done, the counterpart itself must be produced.

Lessor may take beneficially under a leasing power.—Where the terms of a power are duly complied with, it is no objection that the lease is granted in trust for the lessor himself, for that is a question merely between the parties. (*Wilson v. Sewell*,

1 W. Black. 617, 624; *Taylor v. Horde*, 1 Burr. 60.)

Equitable relief where power of leasing has been badly executed.—There are certain cases in which a Court of Equity will relieve a defective execution of a power of leasing, where the terms of the power have not, through some inadvertence, been complied with. Hence, under a power to grant leases in possession, equity will relieve where a former lease is abandoned, although not actually surrendered; as it also will where there is merely a defect in the mode of execution, as where the instrument is only attested by two witnesses where the power requires three, or where it is only under the hand when it ought to be under the hand and seal of the party; or where the donee of the power has contracted to grant a lease, but died before completing it (*Shannon v. Bradstreet*, 1 Sel. & Lef. 52; *Doe v. Weller*, 7 T.R. 478); because in none of these cases is there any fraud on the remainder-man, but merely an oversight of some prescribed formality. But where the interests of the remainder-man are in anywise prejudiced; as where the power is to grant leases in possession, and the donee grants reversionary leases; or where the power is to be restricted to such premises as have been usually demised, and the lease comprises lands that have not been so demised, or where the best rent is to be reserved, and this is not done, or where the power directs that the leases shall contain a covenant for the payment of rent, with a clause of re-entry in default thereof; or that the lessee shall not be made punishable for waste, and that he shall execute a

counterpart, and all, any, or either of these clauses are omitted in the lease, such acts or omissions will be viewed as a fraud on the remainder-man, and such an invasion of his rights and interests as to repel all claim to equitable interference in aid of the defective execution of the power. (*Temple v. Baltinglass*, Finch, 275; *Doe dem. Ellis v. Sandham*, 1 T. R. 705.) And where a lease is void under a power, no subsequent acceptance of rent can make good or render that valid which was actually void *ab initio*. (*Jones v. Varney*, Willes, 169; *Doe v. Watts*, 7 T. R. 82.)

Mortgagee and mortgagor.—A mortgagee, unless in pursuance of a leasing power conferred upon him, cannot make a lease so as to be binding on the equity of redemption. (*Hungerford v. Clay*, 9 Mod. 1.) Indeed, if it were otherwise, it would be in the power of a mortgagee to debar the mortgagor of his benefit of redemption, by granting long leases upon fines; added to which, the mortgagor, on paying off the mortgage, would have no legal remedy for the recovery of the rent accrued due before the reconveyance to him; for until then, he is neither party to the lease nor to the estate (*Keach v. Hall*, Doug. 22); and thus it is that where a defendant has not obtained possession under the plaintiff, the latter can only recover rent from the time he has the legal estate in him, although he may have had the equitable long before. (*Cobb v. Carpenter*, 3 Camp. N.P.C. 13.) Neither can a mortgagor grant a lease that will be binding on the mortgagee; for all leases or other interests in land created by the mortgagor subsequently to the mortgage, are abso-

lately void as against the mortgagee, who may treat the tenants under such leases, or persons claiming such interests, as trespassers, disseisors, and wrongdoers. (*Keech v. Hall*, Doug. 21.) But such leases will nevertheless be conclusive as against the mortgagor himself, who granted them, and will be binding on his equity of redemption. (2 Com. Dig. 107.)

II. That the Lessee has the Capacity to receive the Lease.

All persons capable of becoming purchasers of real estates are capable of holding leasehold property; a subject which has already been fully treated of in a preceding part of the present work (see vol. i. p. 198, *et seq.*), and to which I must beg to refer my readers. An alien friend, though incapable of holding landed property of any description in this country, may nevertheless hold a house for the purpose of trade and merchandise; and, from what appears in Blackstone (vol. 2, p. 93), it might also be inferred that he may hold a lease for that purpose; but the law is otherwise; for the statute 32 Hen. 8, c. 16, s. 13, and which is still in force, makes all leases of any dwelling-house or shop within this realm made to aliens void (*Jevens v. Harridge*, 1 Saund. Rep. 56); so that if a lease be granted to one, and he takes possession under it, the lessor may at any time he thinks proper enter and eject him. (*Lapierre v. McIntosh*, 1 Per. & Dav. 629.) For the convenience of trade, however, an alien is permitted to hire a house for that purpose, and a possession under this permissive occupation, if of a tenement of 10l. a

year, has been held to confer an interest which enables him to gain a settlement by the provision of the legislature. (*Rex v. Eastbourne*, 4 East, 107; Woodf. Land. and Tenant, 38, 4th edit.)

III. *That the Lease is a Valid Lease.*

Previously to the Statute of Frauds, 29 Car. 2, c. 3, a lease might have been made by parol for any number of years (Shep. Touch. 267); but by that statute all leases, as we have already seen (*ante*, vol. i. p. 66), must be in writing, and signed by the parties themselves, or their agents, duly authorized, otherwise they will only operate as estates at will, excepting leases not exceeding three years from the making (secs. 1, 2, 3). But even in the case of written instruments, questions have often arisen as to whether they are actual leases, or mere agreements to grant a lease at some future period. The best criterion for determining a point of this kind is the intent of the parties, to be collected from the language of the instrument, in which, if there are sufficient expressions to denote that its object and design is that one party shall divest himself of the possession, and the other come into it for a certain specified time, such expressions, whether they run in the form of a *license*, *covenant*, or *agreement*, are of themselves sufficient, and will in construction of law be as effectual for creating a lease as if the most pertinent form of words had been employed for that purpose; whilst, on the other hand, where the most technical form of words whereby to describe and pass a present lease for years are made use of; yet if, taking the whole instrument together,

there appears to be no such intent, but it is only preparatory to, and relative to, a future lease, to be thereafter made, the law will rather do violence to the words than break through the manifest intent of the parties. The leaning of the courts has, however, generally been to construe instruments rather as leases than agreements, where the terms have been such as possibly to admit of that construction. Thus, previously to the Statute of Frauds, it was held, that if a man said, "I will that you shall have a lease for twenty-one years, paying 10s. yearly rent: make a lease in writing, and I will seal it," this was a perfect lease. (*Axon. Moore*, 38; cited in *Maldon's case*, Cro. Eliz. 33.) So where by articles indented and under seal, it was covenanted between the parties that J. H. "doth let" certain lands for a certain term, to begin from the Term of St. Michael next following, provided that the defendant paid a certain rent; and also the same parties covenanted that a lease should be made and sealed upon the feast of All Saints; it was held that this was a good present demise, and what followed was merely for further assurance (*Harrington v. Wise*, Cro. Eliz. 486; *Noy*, 57; *Moore*, 456); a doctrine which has been confirmed by a vast number of more recent decisions. (*Drake v. Munday*, Cro. Car. 207; *Evans v. Thomas*, Cro. Jac. 172; *Lady Montague's case*, ib. 301; *Richards v. Seely*, 2 Mod. 79; *Barry v. Nugent*, cited 5 T. R. 165; *Baxter v. Abrahall*, 2 W. Blacks. 973; *Right dem. Green v. Proctor*, 4 Burr. 2208; *Poole v. Bentley*, 12 East, 286; S. C. 2 Camp. N. P. C.

286; *Doe dem. Colcombe v. Fidler*, Peake, Add. Cas. 33; *Doe dem. Walker v. Groves*, 15 East, 244; *Wright v. Trevesant*, 3 Car. & Pay. 441; S. C. 1 Mood. & Malk. 231; *Pinero v. Judson*, 6 Bing. 206; S. C. 3 Moore & Pay. 497; *Stainforth v. Fox*, 7 Bing. 590; S. C. 5 Moore & Pay. 589; *Doe dem. Phillip v. Benjamin*, Per. & Dav. 440; *Doe dem. Pierson v. Ries*, 8 Bing. 178; S. C. 1 Moore & Scott, 159; *Alderman v. Neate*, 4 Mees. & Wels. 704; *Wilson v. Chisholm*, 4 Car. & Pay. 474; *Hancock v. Caffyn*, 1 Moore & Scott, 521; 8 Bing. 358; *Warman v. Faithfull*, 5 B. & Ad. 1042; S. C. 3 Nev. & Man. 137.)

When an instrument will operate as an agreement only.—But if, on the other hand, the intention is manifest that the instrument is not intended to operate as a lease, it will be treated as a mere agreement. As, for example; if the instrument were to contain an express proviso that it shall not operate as a lease, or actual demise, it will be held to be merely an agreement, notwithstanding it may contain words of present demise, with a stipulation for re-entry, on breach of the covenants. (*Perring v. Brook*, 7 Car. & Pay. 360; S. C. 1 Mood. & Rob. 510.) And words also that denote that the lease is not to commence until some future time; as, where the instrument, after stating that A shall hold and enjoy, *engages to give him a lease from Whitsuntide next* (*Roe dem. Jackson v. Ashburner*, 5 T. R. 163; see also *Goodtitle dem. Estwick v. Way*, 1 T. R. 735); or that some future act is to be done before the relation of landlord and

tenant is to commence ; as, where the lessor was to acquire an *additional piece of ground, without which the lease was not to be granted*, will afford a proof that the instrument was intended merely as an agreement, and not as an actual lease. (*Ib.*) So where a person agreed to let certain premises from a day past at a specific rent, containing the terms of the tenancy, and stipulating that the lease should be granted immediately *after the supposed lessor should obtain his lease of the same premises, under an agreement previously entered into for that purpose*, it was held that this was no more than an agreement for a lease ; for here a future act was clearly necessary to create the relation of landlord and tenant, which could not arise whilst the lessor had no demising power. (*Hayward v. Haswell*, 1 Nev. & Per. 411 ; S. C. 6 Ad. & Ell. 265.) And upon the same principle, where a landlord and tenant, between whom there was a subsisting tenancy, agreed in writing, for letting upon different terms from those upon which the premises were then holden, *the amount of rent to be settled by valuation, and the tenant to find sureties*, and the amount *not* having been so settled, nor any sureties given, it was held that the instrument, though it contained words of present demise, did not operate as a lease, nor alter the terms of the existing tenancy. (*John v. Jenkins*, 1 Crompt. & Mee. 227.) And an instrument reciting that A, in case he should be entitled to certain copyhold premises *on the death of B*, would immediately demise the same to C, declaring that he did thereby agree to demise the same, with a subsequent covenant to procure a

license to let from the lord, was held to operate as an agreement and not as an absolute demise. There were, it seems, two grounds for this determination. First, not only was A to acquire the premises, but he was also to obtain the license of the lord, and thus a future event was to take place, and a future act to be performed, before the lease was to be granted. And, secondly, to construe it as a present lease would be to cause a forfeiture, which would have been contrary to the intent of the parties, who had cautiously guarded against it by a covenant that a license to lease should be obtained of the lord. (*Doe dem. Coore v. Clare*, 2 T. R. 739.) And it appears that there was even another ground upon which this case was determined; viz. that the instrument had an agreement stamp attached to it, and not adapted for an actual lease. In order, however, that a stamp may have any weight upon the construction of an instrument, it must have been affixed to it at the time of signature, or at any rate before a doubt, question, or dispute had arisen upon the subject; for if placed there afterwards, it will only serve to shew it to be such as the party producing it had been advised would be the best to have adopted after such doubt, question, or dispute had arisen (See *Com. Land. and Tenant*, 74, a, x); and it has long been settled that any collateral circumstances occurring *subsequently* to the making of the instrument will not be permitted to have any weight in guiding its construction. The only thing to be considered is the intention of the parties *at the time of entering into it* as therein expressed. (*Morgan v. Bissel*, 3 Taunt. 71.)

Recent enactments respecting instruments of this kind.—With respect to future instruments, the recent statute, 8 & 9 Vict. c. 106, s. 3, enacts, that a lease required by law to be in writing of any tenements or hereditaments made after the 1st day of October, 1845, shall be void at law, unless made by deed ; so that, after the period mentioned in the Act, no instrument, unless under seal, however worded, can be construed as a lease ; but this will not prevent an instrument under seal from being construed as an agreement, where, from the terms in which it is expressed, the parties evidently intended it should have that operation.

The term must be certain.—It is essential to the validity of a term of years that it should have a certain beginning and a certain ending (1 Ins. 486 ; Bac. Abr. tit. Lease, L ; 4 Cru. 62), or in other words, the continuance of the term must be measured by years, months, weeks, days, or some other period equally reducible to a certainty with years, months, weeks, days, &c. so that the extreme bound of duration of interest may be ascertained, at latest immediately after the term commences in interest, otherwise it will not be good (Shep. Touch. 267 ; 2 Blac. Com. 144 ; 2 Prest. Conv. 161.) Still, notwithstanding the term must have a certain beginning and a certain end, this does not exclude conditions to defeat or collateral determinations to put an end to these terms in the meantime, before they have filled the full measure of their continuance (2 Prest. Conv. 162), neither is it repugnant to the nature of a lease that it should in certain cases cease and again revive ; as in the instance

of a tenant in tail making a lease for years, in conformity to the statute enabling tenants in tail to make leases (32 Hen. 8, c. 28), and dying without issue leaving his wife *enceinte* with a son, when the lease, although it will cease, as being void against the remainder-man, will yet revive as soon as the son is born. And in like manner if a person whose wife is dowable make a lease and die, although his wife surviving him may avoid the lease, yet after her death so much of the lease as is then unexpired will again be in force. (*Peto v. Pemberton*, Cro. Car. 101 ; Co. Litt. 46 ; Shep. Touch. 275.) A lease to commence from the date may be taken inclusive or exclusive, as will best effect the intention of the parties. (*Freeman v. West*, 2 Wils. 165 ; *Pugh v. Duke of Leeds*, Cow. 714 ; *Ackland v. Lutley*, 1 Per. & Dav. 636.) Hence where there is a power to grant leases in possession, or the lease conveys a freehold interest, as for life or lives, it will be construed inclusive, because in the first instance the power would otherwise be badly executed, and in the second it would be altogether inoperative as an estate of freehold to commence *in futuro*, unless this construction were to be adopted. (*Hatter v. Ash*, 1 Lord Raym. 84 ; *Bellasis v. Hester*, ib. 280 ; *Rex v. Adderley*, Doug. 465.) When the time of commencement is specified, or when the term is expressed to commence from the making, or from henceforth, or from no date at all, or from an impossible date, as the 30th February or 31st November for instance (Co. Litt. 46, b ; *Arnitt v. Bream*, 2 Lord Raym. 1082), it shall then take effect from the time

of the delivery of the deed (*Llewellyn v. Williams*, Cro. Jac. 258); but where the limitation is altogether uncertain, as a lease from the 10th day of October, to hold from the 20th day of November, without saying what November is meant, this uncertainty will avoid the lease; because the limitation forms part of the agreement, and the Court cannot determine it, for want of knowing what the terms of the contract really are. (Bac. Abr. Leases, L. 1; *Anon.* 1 Mod. 180; 4 Cru. 63.) And if a deed have a sensible date, the word "date" occurring in other parts of the deed means the day of the date and not of the delivery. (*Oshley v. Hicks*, Cro. Jac. 263; *Hall v. Cazenove*, 4 East, 477; *Styles v. Wardle*, 4 B. & C. 908; see also Woodf. Land. and Ten. 72.) Where, however, the term itself is certain, it will not fail, because the time at which it is limited to take effect in possession may be uncertain; as in the case put by Lord Kenyon (3 T. R. 463), of a lease granted for twenty-one years, to commence from the death of three lives then in being; for though there appears no certainty of the actual time of commencement of the lease, yet, if by reference to a certainty, it may be made certain, it is sufficient (Dy. 124; 6 Rep. 34, b; 4 Cru. 63; Shep. Touch. 272); and here, although it was uncertain when the lease would commence, yet when the lives die, which is sure some time or other to happen, then this uncertainty is removed. Upon the same principle also, if A grant a lease to B for so many years as J. S. shall name, notwithstanding this was uncertain at the begin-

ning, yet, when J. S. has named the years, this will reduce the term to a certainty. This nomination must, however, be made in the lifetime of the parties, because it is essential to every lease that there should be a lessor and a lessee; and thus it is that a lease for so many years as the executors of the lessor should name would not be good. (Bac. Abr. Leases, L. 2; see also Woodf. Land. and Ten. 73.)

Lease not perfected until entry, when. — Under a common-law lease, the term is not perfected without an actual entry by the lessee on the demised premises. The interest he acquires upon the execution of the lease is called an *interesse termini*, giving him only a right of entry on the tenement, which, when he has by entry reduced into possession, the estate is then, but not before, vested in him, and until then he could not grant an underlease of the premises (1 Ins. 46); still an entry for this purpose may be made as well by the representatives of the lessee after his death as by the lessee himself during his lifetime. (Bac. Abr. M. 1; 1 Cru. 329.) These remarks are, however, only applicable to a common-law lease; for, if a term of years be created by way of bargain and sale under the Statute of Uses (27 Hen. 7, c. 10), and which does not require to be enrolled (*Heyward's* case, 2 Co. 35; *Fox's* case, Shep. Touch. 93, that statute would execute the possession in the lessee in the same manner as his entry would have done in the case of a lease at common law; in either of which cases an underlease granted by him afterwards would be good. (*Lutwich v. Mitton*, Cro. Jac. 604; *Iseham v. Morrice*,

Cro. Car. 110; *Saffyn's case*, 5 Rep. 124; *Barker v. Keate*, 2 Mod. 252; *Geary v. Bearcroft*, Carth. 66.) And notwithstanding it has been considered that no use could be raised on a bargain and sale without a pecuniary consideration, it has been long settled that not only will a mere nominal consideration, as five shillings, for instance, be sufficient, but also that reservation of a mere nominal rent, as a peppercorn or a barleycorn, will be enough to raise a use of this kind (*Barker v. Keate*, 2 Mod. 252; 4 Cru. 126; *Shortridge v. Lamplugh*, 2 Lord Raym. 798; S. C. Salk. 678; 7 Mod. 71); and where the consideration is sufficient, any words, as for example, "give, grant, confirm, agree, or covenant," for money, will enable the instrument to operate as a bargain and sale. (*Grey v. Edwards*, 4 Leon. 110; Cornish on Purchase-deeds, 13.) Still, for all this, the words "bargain and sell" are the most apt and technical terms, and it is the more accurate plan, where a term is intended to be created by way of bargain and sale, to insert no other operative words. It will be proper also to remark here, that although a lessee under a common-law lease cannot grant an underlease until he reduces his *interesse termini* into possession, by entry, yet in those cases where the term is only granted to commence *in futuro*, he may assign it over before entry; because he cannot then reduce his interest into possession by an immediate entry, as that would be a disseisin. (Bac. Abr. Leases M.; 4 Cru. 241.)

Rent.—It will, as I have before remarked, be requisite to ascertain that the reserved rent does not

exceed the specified amount. This may easily be ascertained by an inspection of the lease. At the same time it will be advisable to see whether or not the rent is correctly reserved; for it has sometimes happened that the *reddendum* in a lease has been so inaccurately framed as to become altogether in-operative, as where it is made payable to strangers (Litt. s. 346; *Cole v. Svey*, Latch. 276); and although rent may be reserved to the heirs, &c. without being reserved to the ancestor (2 Prest. Conv. 184; Bac. Abr. Rent; Co. Litt. 2136, and note); yet it will only be so when named by that appellation; hence, where a father and his son and heir-apparent demised lands for years, to begin after the death of the father, rendering rent to the son, such reservation was holden to be void; for the reservation to the son being by his proper name, and not to him as heir, was the same as if it had been to a stranger; and, though the son did prove heir, it bettered not the case by that event. (*Oates v. Frith*, Hob. 130; *Southampton v. Brown*, 6 B. & C. 718.) So if the reservation be simply to the lessor, without naming his representatives, the rent will only continue during his lifetime (2 Wms. Saund. 367; Shep. Touch. 114); and the construction will be the same where the reservation is to the lessor or his heir, which will be good to the lessor for his life, and void as to his heir afterwards. (Co. Litt. 214, a.) Again, if a rent to a lessor and his assigns, it will determine by the lessor's death (1 Jus. 47, a; *Wootton v. Edwin*, 12 Rep. 36), as it also will if reserved to him and his executors, *without saying during the term*, where he has a free-

hold interest (*Saccheverell v. Frogate*, Ventr. 161; S. C. 2 Wms. Saund. 361; 2 Roll. Abr. 450); for the executors cannot have the rent, though they be named, because they are not the representatives of the lessor *quoad* the reversion to which the rent is annexed; and the heirs cannot have it, because they are not named. (*Saccheverell v. Frogate*, *suprà*.) In like manner, if an underlease be made of a term of years, rendering rent to the lessor and his heirs, *without limiting it during the term*, it will determine by the lessor's death; for the heir cannot have it, because he cannot succeed to the reversion, which is only a chattel, and the executors cannot have it, as there are no words to carry it to them. (*Drake v. Munday*, Cro. Car. 207.) This is one of the reasons, therefore, why the rent ought generally to be reserved *during the term*, for then it will be incident to the reversion, and belong to the heir, executor, or assignee who, for the time being, shall be the owner of such reversion, notwithstanding the omission of the words "to the heirs" in the case of freehold, and of "the personal representatives" in the case of chattel interests. (*Saccheverell v. Frogate*, *sup.*; *Bury v. Brown*, Latch. 99, 100. See also 8 Rep. 71; Bac. Abr. Rent.) At the same time there is nothing to preclude a lessor, if he wishes it, from reserving a rent to commence from and after a given time or a given event, or to cease before the end of the term; but whenever this is done, the render should be to the lessor and such of his representatives as the reversion will devolve upon at his decease. (2 Prest. Conv. 184.) Where, however, no reversion is left in the lessor, as in

the instance of a tenant for three lives, to him and his heirs, assigning over his whole estate, reserving to himself, his executors, administrators, and assigns a certain rent, it will go to his personal representatives, and not to his heirs. (*Jenison v. Lexington*, 1 P. Wms. 555.) If a tenant in tail demise for years, rendering rent to himself and his heirs, the rent will go to the heir in tail, as being incident to the reversion, if the reversion shall descend upon him, though he may not answer the description of general heir of the lessor. (Hard. 89; 1 Ventr. 168; Com. Dig. Rent, B. 5.) And if a person seised *ex parte maternâ*, or in any other special manner, makes a lease reserving rent to him and his heirs, the rent, as incidental to the reversion, will belong to the heir inheritable to the estate descending on him. And the like rule prevails in respect of the rent of lands in gavelkind and borough English. (2 Prest. Conv. 190.)

Covenants.—Covenants in leases are expressed or implied: an express covenant being an agreement by deed between two or more for the performance or forbearance of certain acts (Selw. N. P. 445); whereas an implied covenant arises by implication of law out of certain technical expressions contained in the deed, and the particular relation in which the parties stand to each other. Thus, on the part of the lessor, it has been held, that there is an implied covenant for quiet enjoyment, under the words "grant and demise" (*Nokes v. James*, Cro. Eliz. 674; *Deering v. Farrington*, 1 Mod. 113; *Style v. Hearing*, Cro. Jac. 73; *Holden v. Taylor*, Hob.

461; *Pincombe v. Rudge*, 1 Yelv. 139; *Coleman v. Sherwyn*, Carth. 67; S.C. Salk. 237; *Fraser v. Skey*, 2 Chitt. Rep. 646; *Iggulden v. May*, 9 Ves. 330; (of which the assignee may take the same advantage as the lessee himself); (*Spencer's case*, 5 Co. 17, a) as there also is on the part of the lessee, that he will cultivate the demised lands in a husbandlike manner (*Powley v. Walker*, 5 T. R. 373); sustain the fences; keep the premises generally in good and tenantable repair (*Cheetham v. Hampson*, 4 T. R. 318; *Whitfield v. Weedon*, 2 Chitt. Rep. 685; 1 Wms. Saund. 322, n.); and will not commit waste thereon. (Shep. Touch. 439.) But although a tenant is bound under an implied covenant to committing waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay on the premises, he will not be bound to make substantial and lasting repairs, such as new roofing, or the like. (*Ferguson v. —*, 2 Esp. N.P.C. 589.) An implied covenant may also be restrained by a qualified or express covenant, in which case it will not be extended beyond the limits of such express covenant; for where there is an express covenant, another cannot be implied; consequently, where a lessor demised and granted a house for a term of years, and covenanted that the lessee should enjoy the house during the term, *without eviction* by the lessor, or *any claiming under him*, it was holden that the express covenant qualified the generality of the covenant raised by implication of law from the words "*demise and grant*," and so that it

should not extend further than the first covenant. (*Noke's case*, 4 Co. 80, b; see also *Deering v. Farrington*, 1 Mod. 113; *Hayes v. Bickerstaff*, Vaugh. 126; *Brown v. Brown*, 1 Lev. 57; *Frontin v. Small*, 2 Lord Raym. 1418; *Browning v. Wright*, 2 Bos. & Pull. 13; *Chater v. Becket*, 7 T. R. 201; *Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephenson*, 4 Bing. N. C. 678.) It does not appear that the word "assign" would have raised an implied covenant. (*Burnett v. Lynch*, 5 B. & C. 609.) And now by the recent statute 8 & 9 Victoria, c. 106, it is expressly enacted that the word "give," or the word "grant," in a deed executed after the 1st day of October, 1845, shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word "give," or the word "grant," may by force of any Act of Parliament imply a covenant. (Sec. 4.)

Distinction between express and implied covenants.—The distinction between implied covenants and express covenants is, that express covenants are taken more strictly against the covenanting party (*Shubrick v. Salmond*, 3 Burr. 1639); consequently, although in an implied covenant the law will excuse him, where he is disabled from performing it, without any default on his part (*Paradine v. Jane*, Aleyn, 27; *Beale v. Thompson*, 3 Bos. & Pull. 420; *Atkinson v. Ritchie*, 10 East, 533); yet in the case of an express covenant, where a party by his own act imposes upon himself a duty or charge, he is bound to make it good notwithstanding inevitable accident; because he might have provided against it by his own covenant. Hence, if

a lessee covenants to repair a house, which is afterwards burnt down or destroyed by lightning, tempest, the king's enemies, or other inevitable accident, he will be bound to repair it. (Dy. 33, a; *Walton v. Waterhouse*, 2 Wms. Saund. 240; S.C. 3 Keb. 40; *Earl of Chesterfield v. Duke of Bolton*, Com. 627.) And even where there is no covenant to repair, yet where there is an express covenant to pay the rent, the latter covenant will remain in force, and the lessee will remain liable to the rent, although the premises are destroyed by fire and are not afterwards rebuilt by the lessor, after notice. (*Monck v. Cooper*, 2 Lord Raym. 1477; S. C. Str. 763; *Pindar v. Ainsley*, 1 T. R. 312, cited; *Belfour v. Weston*, 1 T. R. 310; *Weigall v. Waters*, 6 T. R. 488; *Hare v. Groves*, Anstr. 687.) Formerly, indeed, the Court of Chancery would have relieved in cases of this description, and although the landlord would not have been compelled to rebuild, he would nevertheless have been restrained from proceeding at law for the recovery of his rent until he did so. (*Camden v. Morton*, cited Selw. N.P. 457; *Brown v. Quilter*, Amb. 619.) But it has been since decided that a tenant has no such equity; and in *Leeds v. Cheetham* (1 Sim. 146), the Lord Chancellor refused to compel a landlord to expend money received from an insurance office on account of the demised property which had been burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises were rebuilt. (See also *Hare v. Groves*, Anstr 687; *Holtzapffel v. Baker*, 18 Ves. 117.)

covenants running with the land, into whose hands soever it may chance to come. Covenants of this kind will be equally binding on a mortgagee, where a term is assigned to him as a mortgage security, as any other assignee of the property. (*Westerdell v. Dale*, 7 T. R. 312; *Stone v. Evans*, cited 7 East, 341; *Williams v. Bosanquet*, 1 Bro. & Bing. 238; *Burton v. Barclay*, 7 Bing. 745.) As it will also on an assignee by operation of law, as a tenant by *elegit* of the term. (*Spencer's case*, 5 Rep. 17, b.) But where, on the other hand, the covenant relates to a thing merely collateral to the property demised, as to pay any collateral sum to the lessor, or to a stranger, or to build a house on the lands of the lessor not included in the demise (*Mayho v. Buckhurst*, Cro. Jac. 438), the assignee, although named, would not be bound by it. (*Mayor of Congleton v. Pattison*, 10 East, 130; *Easterby v. Sampson*, 1 Cro. & Jer. 118; *Flight v. Glossop*, 2 Bing. N. C. 131.) Neither is an assignee responsible for any breach of covenant by the lessee previous to the assignment (*Grescot v. Green*, Salk. 199; *Churchwardens of St. Saviour's v. Smith*, 3 Bur. 1271; S. C. 1 Black. 351), nor for any breach of covenant committed after he has assigned over the devised premises to another person (*Pitcher v. Tovey*, Salk. 81; S. C. by name of *Tovey v. Pitcher*, 3 Lev. 295; *Chancellor v. Poole*, Doug. 764); and an assignment to a beggar, or a person about to leave the kingdom, provided it be done before his departure, will be valid, and this notwithstanding the assignee never takes possession under it. (*Lereux v. Nash*, Str. 1221;

Taylor v. Shum, 1 Bos. & Pull. 21; *Odell v. Wake*, 3 Camp. N. P. C. 394.) But an assignee cannot, by assigning his term before action brought, defeat an action for a breach of covenant running with the land and incurred in his time, where the right of action is complete, and vested previously to such assignment. (*Harley v. King*, 2 Cr. M. & R. 18.)

What kind of covenants will run with the land.
—Covenants for quiet enjoyment (*Noke v. Awdrey*, Cro. Eliz. 375; *Lewis v. Campbell*, 3 Moore, 35, 51; 3 Barn. & Ald. 392), for further assurance (*Middlemore v. Goodhall*, Cro. Car. 503; *Kingdon v. Nottle*, 4 M. & S. 53), to renew the lease (*Istead v. Stoneley*, 1 Anders. 82; *Brookes v. Bulkeley*, 2 Ves. 498; *Simpson v. Clayton*, 4 Bing. N. C. 758), or to produce title-deeds (*Barclay v. Raine*, 1 Sim. & Stu. 449), are covenants running with the land, binding on the reversion, and for breach of which the assignees of the lessee may maintain an action against him. A covenant by a lessor to build a new smelting-mill in lieu of an old one, in a lease of mines, has been considered as a covenant running with the land. (*Sampson v. Easterby*, 9 B. & C. 505; S. C. in error, under the name of *Easterby v. Sampson*, 6 Bing. 644; 1 Cr. & Jen. 105; 4 Moore & R. 601.) And so also has a covenant by a lessor to supply two houses with good water at a rate therein mentioned for each house. (*Jourdan v. Wilson*, 4 B. & Ald. 266.) But a covenant by a lessor to pay for all trees planted by the lessee does not run with the land. (*Grey v. Cuthbertson*, 2 Chitt. Rep. 482; Selw. N.P. 498.)

Covenant not to assign without license.—A covenant not to assign or underlet without license, with a clause of re-entry in case of breach, is frequently introduced into leases for the purpose of securing a responsible tenant to the lessor. This covenant does not, however, run with the land, and though often inserted, it will not, strictly speaking, come under the description of a *common and usual* covenant. Thus, in *Henderson v. Hay*, where a bill was filed for a specific performance of an agreement by a landlord to grant a lease of a public-house containing the common and usual covenants, Lord Thurlow said, that though the covenant not to assign without license might be a very usual one where a brewer let a vintner a public-house, that would not have made it a *common* covenant, and he held accordingly that the landlord was not entitled to have it inserted. (3 Bro. C. C. 632.) In *Morgan v. Slaughter*, however, Lord Kenyon seems to have entertained a different opinion, for he there held that such a covenant was a fair and usual covenant. (1 Esp. N.P.C. 8.) But in *Church v. Brown* (15 Ves. 258), Lord Eldon fully recognised the opinion expressed by Lord Thurlow in *Henderson v. Hay*, above cited, as did also Sir Wm. Grant in *Brown v. Ruban* (15 Ves. 529; see also *Bennett v. Womack*, 9 B. & C. 627; *Van v. Corpe*, 3 Myl. & Ke. 269; *Probert v. Parker*, ib. 280). The granting of an underlease is not a breach of a covenant not to assign without license. (*Cruso and Bugby v. Blencowe*, 3 Wils. 234; S. C. 2 Black. 766.) Neither is the depositing of the lease as a security with a creditor. (*Doe and Pitt v. Laming*, 1 R. & M. 36.)

But where a covenant was that the lessee would not set, let, or assign the whole or any part of the premises without leave, an underlease was holden to be a breach. (*Roe and Gregson v. Harrison*, 2 T. R. 426.) So where there was a proviso that the lease should be void, "if the lessee assigned or otherwise departed with the indenture of lease for the whole, or any part of the term, without leave in writing, it was held that an underlease was included under those terms. (*Doe and Holland v. Worsley*, 1 Camp. N. P. C. 20.) And a lease for the whole term will amount to an assignment, although the rent be reserved to the lessee, and the power of re-entry is given to him, and not to the reversioner. (*Palmer v. Edwards*, Doug. 186, n.) Yet the exception of a single day out of the term will be sufficient to render it an underlease. (*Holford v. Hatch*, Doug. 182.) And where a license to assign is once given, the condition is entirely discharged (*Dumper's case*, 4 Rep. 1196; Cro. Eliz. 815; *Leeds v. Crompton*, cited 4 Rep. 120, a; *Brummell v. Macpherson*, 14 Ves. 173), and this whether the license be given as to the whole or only as to part of the demised premises. (4 Rep. 120, a.) Still where the license to assign is restricted to some specified mode of disposition, as to assign by will for example, and which is made by the lessee accordingly, though such assignment is undoubtedly good, yet this will not warrant his executors in making another assignment, and if they do, it will be bad.

Assignment by operation of law no forfeiture.—

An assignment by operation of law, as where a

lease passes to the assignees upon the bankruptcy of a lessee, will be no breach of a covenant not to assign without license; neither is an assignment to a person purchasing the term from a sheriff under a *bonâ fide* execution (*Doe dem. Mitchinson v. Carier*, 8 T. R. 57), although it clearly would be, if the execution was fraudulently done for the mere purpose of evading the covenant; as where a lessee gives a warrant of attorney to confess a judgment to a creditor for the purpose of enabling such creditor to take the lease in execution. (*Ib.*) And if a lease contain a proviso making it void in case the lessee, his executors or administrators, alien without a license in writing, a voluntary assignment by the executor or administrator without such license will amount to a forfeiture. (*Roe dem. Gregson v. Harrison*, 2 T. R. 425.) And where a lease contains a proviso for determining the term on the lessee's becoming bankrupt, this condition being annexed to the demise itself will avoid the term, and the landlord may in such case re-enter on the property. (*Roe v. Galliers*, 2 T. R. 133; *Wilson v. Greenwood*, 1 Swanst. 481; *Goring v. Warner*, 2 Eq. Ca. Abr. 100; 7 Vin. Abr. 85; *Philpot v. Hoare*, Amb. 480; 2 Atk. 219; *Doe dem. Godbehere v. Bevan*, 3 Mau. & Selw. 353; *Doe dem. Lloyd v. Powell*, 5 B. & C. 308; *Ex parte Shearman*, Buck. 462.)

Bankrupts discharged from covenants, when.—

The statute of 6 Geo. 4, c. 17, contains a proviso (s. 75) discharging a bankrupt lessee from his covenants: First, when the assignees accept the lease, in which case it declares that the bankrupt

shall not be liable to pay any rent accruing after the date of his commission, or to be sued in respect of the non-performance of any of the covenants. Secondly, where the assignees decline the same. Nor will the bankrupt be liable in case he delivers up the lease within fourteen days after he shall have notice that the assignees shall have declined to accept the lease. In this case the covenants on both sides fall to the ground. (*Kersey v. Carstairs*, 2 B. & Ad. 716; see also *Doe dem. Cheere v. Smith*, 5 Taunt. 795.) And thirdly, where the assignees do not upon request elect whether they will accept or decline, in which case the Lord Chancellor has power upon petition to order the assignees to elect and to deliver up the lease and possession of the premises. (Selw. N. P. 481.)

But this section only empowers the Lord Chancellor to make an order that the assignees shall elect; it does not enable him to determine the question whether the assignees have elected to take the lease or not, but he can only send such a question to be tried by a jury. (*Ex parte Quantock*, Buck. 189.) And upon a petition for an order for the assignees to elect, they will be allowed a reasonable time, such as ten days, for instance, to consider what will be most beneficial to the creditors. (*Ex parte Scott*, 1 Rose, 446, n. a.) With respect to what acts will be construed to be an acceptance by the assignees, it appears that if they assume the direction and management of the property included in the lease (*Thomas v. Pemberton*, 7 Taunt. 201; *Hanson v. Stevenson*, 1 B. & Ald. 303), or permit

the bankrupt to remain in the occupation of the demised premises, and to carry on the trade for the estate under their directions (*Clarke v. Hume*, 1 R. & M. 207; *Gibson v. Couthope*, 1 Dowl. & Ry. 205), they will be considered to have accepted the lease. But merely attempting to sell the lease, provided they neither take possession nor exercise any acts of ownership over the premises, will not be so construed (*Turner v. Richardson*, 7 East, 355; *Wheeler v. Bramah*, 3 Camp. N. P. C. 340); yet if in the endeavour to sell there is a bidding, and the assignees accept it and receive a deposit, it will afford evidence of their assent to take the premises, from which they will not be released although the contract should be afterwards rescinded. (*Hastings v. Wilson*, Holt. Rep. 290.)

Distinction between conditions or provisoes, and covenants not to assign without license.—Before dismissing this part of our subject, it may not be amiss to point out the distinction between conditions or provisoes for avoiding the term in case the lessee should assign without license, and where the lessee is restrained from so doing by covenant only; which seems to be, that where the lessee is restricted from assigning by condition or proviso, and for avoiding the term in case of a breach thereof, and the lessee assigns, his estate will be thereby determined, and his assignment will be actually void. But if the lessee be restrained from so assigning by covenant only, although thereby he will be guilty of a breach of covenant, yet the assignment itself is not void. (*Paul v. Nurse*, 8 B. & C. 488.) Acceptance by the lessor of rent

due after breach of a covenant of this kind *with notice*, will also be a waiver of the forfeiture. (*Whichcote v. Fox*, Cro. Jac. 398; *Goodright and Walter v. Davids*, Cow. 804.) But a court of equity will not relieve against a forfeiture thus incurred. (*Hill v. Barclay*, 18 Ves. 63.)

Renewable leaseholds.—The title to renewable leaseholds, as far as such right of renewal is concerned, will depend either upon a tenant right of renewal, or upon express covenants for that purpose. With regard to the former, in the case of leases under the Crown, ecclesiastical corporations, colleges, &c. if the tenant is willing to pay the fine and rent demanded, he is seldom turned out of possession. This preference in equity is termed the tenant right, which, though no certain or even contingent interest in law, there being no actual means of compelling a renewal, is yet a right recognised in equity; so that, wherever a grant of a reversionary lease is obtained to the prejudice of the old tenant by undue means, whether by *suggestio falsi* or *suppressio veri*, the party obtaining it, though a mere stranger, or a purchaser with notice, shall not be permitted to hold it to his own use. (*Parker v. Brooke*, 9 Ves. 482.) Whoever, therefore, has a tenant right of renewal in a lease, has an interest in the renewal; so that when an additional term is granted, the old term may be said to be still in being, and the renewed interest will be subject to all its incidents and liabilities. (*Palmer v. Young*, 1 Vern. 276; *Rawe v. Chichester*, Amb. 719; *Winslow v. Tighe*, 2 Ball & B. 205. See also

Collet v. Hooper, 13 Ves. 258; *Featherstonhaugh v. Fenwick*, 17 ib. 298.)

Leases under covenants for renewal.—The right of renewal under a covenant may be for a limited term, or perpetual. Generally speaking, however, covenants for perpetual right of renewal are not much favoured (*Baynham v. Guy's Hospital*, 3 Ves. 295; *Moore v. Foley*, 6 ib. 232); though such a right may be clearly conferred where the lease is granted by persons entitled to the fee-simple and inheritance of the demised property. (*Bridges v. Hitchcock*, 5 Bro. P. C. 6.) Yet, as a covenant of this kind is construed strictly in favour of the lessor, a covenant to renew under the same covenants as contained in the original lease has been held not to include a covenant for perpetual renewal. Hence, where A by indenture, in consideration of a certain sum in the nature of a fine, and of a yearly rent, demised land for twenty-one years, and covenanted at the end of eighteen years of the term, or before, on request of the lessee, to grant a new lease of the premises “for the like fine, for the like term of twenty-one years, at the like yearly rent, with *all* covenants as in that indenture were contained,” it was holden that this covenant was satisfied by a tender of a new lease for twenty-one years, containing all the former covenants except the covenant for future renewal. (*Iggulden v. May*, 7 East, 237. See also *Hyde v. Skinner*, 2 P. Wms. 196; *Redshaw v. Bedford Level Company*, 1 Eden, 349; *Lee v. Vernon (Lord)*, 5 Bro. P. C. 10; *Tritton v. Foote*, 2 Bro. C. C. 636; *Doe dem. Hardwicke v. Hardwicke*, 10 East,

549.) And the same construction is put upon such a covenant in equity; and such construction ought not (as was permitted to be done in *Cooke v. Booth*, Cow. 819) to be affected by the previous acts of the parties. (*Baynham v. Guy's Hospital*, 3 Ves. 295; *Eaton v. Lyon*, ib. 691; *Moore v. Foley*, 6 ib. 232; *City of London v. Mitford*, 14 ib. 50; *Watson v. Hemsworth Hospital*, ib. 324; *Willan v. Willan*, 16 ib. 72; *Dowling v. Mill*, 1 Mad. 548; *Higgins v. Rose*, 3 Bligh, 113.) And notwithstanding the Court will lean against construing a covenant to be for a perpetual renewal, still, if it clearly appears to be so, it must be specifically executed; and a purchaser from a tenant in tail, with notice from him of an agreement to renew a lease under which his father as tenant for life had agreed to renew, is bound to renew accordingly. (*Brook v. Bulkeley*, 2 Ves. 498.)

How the right of renewal may be lost.—A right of renewal may be lost by the laches of the tenant in neglecting to make his application within the time prescribed by the covenant. Hence, where a lease for sixty-one years contained a covenant that at any time within one year after the expiration of the said term of sixty-one years, upon the request of the lessee, and his paying 6*l.* to the lessors, they would execute another lease to the lessee of the same premises, *for and during the further term of twenty years, to commence from and after the expiration of the said term of sixty-one years, &c. and so in like manner* at the end and expiration of every twenty years during the said term of sixty-one years, for the like consideration, and upon the

like request, would execute another lease *for the further term of twenty years, to commence at the end and from the expiration of the term last before granted, &c.* it was holden that under this covenant the lessee could not claim a further term of twenty years at the expiration of the last twenty years in the lease, if he has omitted to claim a further term at the end of the first and second twenty years of the lease. (*Rubery v. Jervoise*, 1 T. R. 229.) Nor, it seems, would equity afford relief to the lessee in a case of this kind. Thus, in *Allen v. Hilton* (cited 1 Fonbl. Eq. 432, n. c), a defendant had covenanted to renew the plaintiff's lease at the request of the plaintiff, within three months before the expiration of the then granted lease. The lease being within a month of expiring, and the plaintiff not having requested a renewal, the defendant agreed to lease the premises to other persons. The plaintiff being then in possession, applied for a new lease, which the defendant refusing, he filed his bill. The Lord Chancellor was clearly of opinion that the plaintiff, having omitted to apply at the time agreed on, was not entitled to relief; observing, that if a lessee were relievable in such a case, he knew not where the Court could stop; it would be saying that the lessee shall be loose and the lessor bound. In the case of *Baily v. Corporation of Leominster* (3 Bro. C. C. 529), Lord Thurlow held that a lessee for lives entitled by covenant to a renewal on application whenever one of the lives should fall, was not entitled to such renewal upon his application when two lives were dropped, though he offered to pay

the fines for both lives ; his lordship observing that the covenants were not mutual. (*M'Alpine v. Swift*, 1 Ball & B. 285.) And even when a lease contains a covenant for perpetual renewal, a specific performance has been refused under circumstances of gross laches, and where there had been such an alteration in the property as that it could not be enjoyed according to the stipulations. (*City of London v. Mitford*, 14 Ves. 41 ; *Mountnorris v. White*, 2 Dow. 459 ; *Baynham v. Guy's Hospital*, 2 Ves. 295.)

Renewed lease will enure to the benefit of the parties entitled under the old one.—Covenants for renewal run with the land (*Shelburne v. Biddulph*, 1 Bro. P. C. 383), are transmissible to the personal representatives of the lessee (*Chapman v. Dalton*, Plow. 284 ; *Hyde v. Skinner*, 2 P. Wms. 196), and are binding, not only on the lessor and his heirs, but also on a future purchaser of the inheritance. (*Richardson v. Sydenham*, 2 Vern. 447.) But where the former lease was in settlement, the renewed lease will be liable to the same trusts. (*Taster v. Marriot*, Amb. 68 ; *Owen v. Williams*, ib. 734 ; *Bowls v. Stewart*, 1 Sch. & Lef. 209 ; *Brookman v. Hales*, 2 Ves. & Bea. 45.) So, whenever a lease is renewed by trustees, it will be subject to the trusts of the old one (*Roe v. Chichester*, Amb. 719 ; *Griffin v. Griffin*, 1 Sch. & Lef. 352), and this, notwithstanding the lessor would not have granted a renewal to the *cestuis que trust* (*Fitzgibbon v. Scarlan*, 1 Dow. 269) ; and where the owner of a partial interest, as a tenant for life, or a mortgagee in possession, renews a lease of this kind,

equity will consider such person, after his own particular interest has ceased, simply as a trustee for the persons beneficially entitled under the pre-existing lease. (*Palmer v. Young*, 1 Vern. 276; *Rawe v. Chichester*, Ambl. 719; *Parker v. Brooke*, 9 Ves. 583; *Collet v. Hooper*, 13 ib. 258; *Featherstonhaugh v. Fenwick*, 17 ib. 302; *Winslow v. Fisher*, 2 Ball & B. 205, 206.) But although the personal representatives of a lessee are entitled to the benefit of a covenant for renewal, the assignees of a bankrupt have been held to possess no such right. (*Vandemanker v. Desborough*, 2 Vern. 96.)

Contribution for defraying the costs of renewal.
—All persons beneficially interested in the renewal of a lease are bound to contribute in defraying the expense thereby incurred in proportion to the interest they respectively take in the property. (*Adderley v. Clavering*, 2 Bro. C. C. 658; S. C. 2 Cox, 192.) With respect to the portions that each party was to bear, the rule formerly seems to have been for the tenant for life to pay one-third, and for those in remainder to pay the residue. (*Verney v. Verney*, 1 Ves. sen. 428; S. C. Amb. 88.) Lord Alvanley, however, seems to have considered that the tenant for life was to pay nothing but the interest. (*Buckridge v. Ingram*, 2 Ves. 652.) But Lord Eldon has disapproved of this doctrine, on the ground of the possible inequality, and to have considered that the cases had decided it was better to determine the proportion upon fact than speculation (*Nightingale v. Lawson*, 1 Bro. C. C. 140; *Stone v. Theed*, 2 ib. 243); therefore, if the tenant for life is bound to pay in any degree,

he ought to pay in proportion to the benefit he *de facto* took under the effect of the transaction ; and that the remainder-man ought also to pay with reference to his proportion of the benefit (*White v. White*, 9 Ves. 554) ; so that if the latter receives the entire benefit of the renewal, as where the tenant for life is himself one of the lives upon which the lease is determinable, the whole of the expenses must be defrayed by the remainder-man, for here the tenant for life receives no benefit whatever from the renewal (the existing lease being at least as durable as his interest), and any money expended by him in effecting such renewal will be a charge on the estate. (*Adderley v. Clavering*, 2 Bro. C. C. 658 ; S. C. 2 Cox, 192.) There is no difference in this respect between a renewable term for years, and a lease for lives renewable. (Per Lord Eldon, 9 Ves. 559.)

Of renewed leases under ecclesiastical persons.—Where leases have been renewed by ecclesiastical persons, it must be ascertained that the old lease has been properly surrendered, for this has often been ineffectually done, and the title has proved defective in consequence. This has occurred where surrender has been made by the *cestui que trust*, instead of from the legal tenant ; or where no actual surrender is made, and the new lease, instead of being granted, as it ought to be, to the legal tenant under the former lease, is granted to the *cestui que trust*, so that there is no virtual surrender of the subsisting lease ; and whenever these defects occur, it will be requisite, in order to complete the title, that the persons having the legal estate should make an

effectual surrender, and obtain a new lease under such surrender; for unless this be done, such a voidable lease, although good against the actual lessor who granted it, will not be binding on his successors; therefore, as soon as a defect of this kind is discovered, no time should be lost in rectifying it, by adopting the course above suggested. To accomplish this object, it is requisite that the old lease should either be surrendered by the parties who take the legal estate therein before the new lease is granted; or should be surrendered in point of law, by the acceptance of such new lease by the parties having the legal estate under the old one, or should be surrendered, ended, or determined within a year from the making of the lease. (32 Hen. 8, c. 28; 1 Ins. 44, b; 2 Prest. Abs. 10, 11.) The surrender ought also to be made to him who has the immediate reversion or remainder, otherwise it will be inoperative. (Co. Litt. 3376; 2 Roll. Abr. 494, c. 12; Cro. Eliz. 803.) He who has the immediate reversion may take a surrender, whether he has it in fee, or in tail, or for life. (2 Roll. Abr. 494, c. 12.) And whatever doubts may have once existed, it is now settled that a possessory term of years will merge in a reversionary one of the same premises, where they both meet in the same parties, whether the term in reversion be greater or less in point of duration of time than the term in possession; so that a possessory term of one thousand years will merge in a reversionary one of twenty, ten, or even a shorter term. (Bac. Abr. tit. Leases (s. 2); *Hughes v. Robotham*, Cro. Eliz. 302; *Challoner v. Davis*, 1 Lord Raym. 401;

1 Prest. Abs. 12.) But a possessory term which a person takes, in *autre droit*, or by operation of law, as executor, or administrator, or in right of his wife, will not merge in the freehold or inheritance, or, it seems, a reversionary term which he had before such possessory term became vested in him by such act of law. Nor will a term so held in another's right be merged by a subsequent descent of the remainder or reversion. (*Platt v. Sleep*, Cro. Jac. 275.) But if the person possessed of a term of years were to purchase such immediate remainder or reversion in the same property, it would effect a merger, even though he be only a trustee of the term; because here he acquires such reversion, &c. by his own act; whereas in the former instance it is cast on him by operation of law.

An intermediate estate will prevent a merger.
—An intermediate estate in a third party will prevent a merger. Thus A made a mortgage for a term of 500 years, and afterwards made another mortgage for a like term. Both the mortgages were satisfied, and the terms were assigned to distinct trustees, upon trust to attend the inheritance. Some time afterwards, the owner of the fee took an assignment of the first term, with the intent to merge it, or have it surrendered; but it was held, that the merger was prevented by the intervention of the other term, outstanding in another person. (*Whitchurch v. Whitchurch*, 2 P. Wms. 236; see also *Duncomb v. Duncomb*, 3 Lev. 437; *Bate's case*, Salk. 254; *Wrottesley v. Adams*, Plow. 191; *Scott v. Fenboullett*, 1 Bro. C.C. 69.)

When, therefore, it was deemed advisable to keep several terms on foot to attend the inheritance, the mode was to interpose an intermediate estate between each term; and thus two trustees might have held any number of terms between them, without any danger of a merger taking place. For example; suppose four terms to be created, respectively, in the years 1750, 1760, 1770, and 1780, in which case, if the terms of 1750 and 1770 are assigned to one trustee, and the terms of 1760 and 1780 to another trustee, all the terms are by this means preserved; there being an intermediate estate between each term. But if the terms of 1750 and 1760 had been assigned to one trustee, and the terms of 1770 and 1780 to the other, then for want of such intermediate estates, the term of 1750 would have merged in the 1760, and the term of 1770 in the term of 1780.

The doctrine above laid down, as Mr. Preston very accurately remarks, shews how cautious the conveyancer should be in surrendering a term; for though it may be well known that this should be made to the person entitled to the next immediate estate in remainder, or reversion, yet this cannot always be done with certainty, for want of knowledge of the precise state of the title; and that it seems advisable to make the surrender by deed-poll, and generally to the person or persons having the next immediate estate in remainder, or reversion; by which mode, it seems, the term would be effectually extinguished. The same learned writer also adds, that the practice of using words of assignment, as well as of surrender, is still more eligible and safe. (2 Prest. Abs. 14.)

Assignments.—As the law stood previously to the recent statute 8 & 9 Vict. c. 106, a term of years in lands might have been assigned by writing without deed, provided it was signed by the party and properly stamped. (*Res v. Little Dean*, Str. 555; *Farmer dem. Earl v. Rogers*, 2 Wils. 26; *Beak dem. Fry v. Phillips*, 5 Bur. 2827.) Previously, indeed, to the Statute of Frauds (29 Car. 2, c. 3, s. 2), it might have been effected by parol; and notwithstanding that statute requires all assignments to be in writing, still, until the statute of 8 & 9 Vict. it was not required to be done by deed, but might have been effected either by a deed or by a mere note in writing signed by the assigning party or his lawfully authorized agents. By the modern Stamp Acts, however (44 Geo. 3, c. 78; 55 Geo. 3, c. 184), all instruments of assignment, whether by deed or note in writing, must be stamped with the common deed stamp. (Coventry on Stamps, 196.) Still, although a stamp of this kind was necessary to give validity to the assignment, such assignment might yet have been made by a simple note in writing; but now the Act of 8 & 9 Vict. declares all assignments, *not being an interest which might have been created without writing*, made after the 1st of October, 1845, to be void at law unless made by deed. But for all this, a mere note in writing, if duly signed by the parties, will, nevertheless, be supported in equity as an agreement, and as such pass the equitable interest in the premises. As this statute does not require the assignment of such interests as might by law have been created without writing to be by deed, it seems that a parol lease not

exceeding three years, and valid as such under the Statute of Frauds, may even now be assigned by a simple note in writing, if stamped with a deed stamp.

How a term of years should be assigned by deed.

—The proper technical words of an assignment are “assign, transfer, and set over.” But the words “give, grant, bargain, and sell,” or any words which shew the intent of the parties to make a clear transfer, will have that effect (4 Cru. Dig. 97, s. 20); neither is any consideration necessary: the tenure, attendance, and subjection to forfeiture, as also the payment of the rent, if there be any, being sufficient to vest the term in the assignee. (*Ib.* s. 18.) But an assignment without consideration would be void as against existing creditors at the time of such assignment (1 Mad. p. 271, 273); as also against purchasers for valuable consideration, even with notice. (*Townsend (Lord) v. Wyndham*, 2 Ves. sen. 1; *Gilham v. Lock*, 9 Ves. 612; *Curtis v. Price*, 12 ib. 103; *Jones v. Croucher*, 1 Sim. & Stu. 315.) With respect to the parcels, it should be ascertained that they correspond either in express terms or by certain reference to those contained in the lease. The *habendum* also should embrace all the assignor’s interest in the term, for if it passes a lesser estate, it will confer an underlease. It was indeed formerly considered that the mere reservation of rent, or of a right of entry by a term or in an instrument purporting to be an underlease, but in point of fact comprising all the estate of the owner, was an underlease; in short that it was a lease as between

the parties. (4 Cru. 97; *Pulteney v. Holmes*, Str. 405.) But it is now settled, that though the instrument import to be a lease, yet if it does in effect comprise *all the estate* which resides in the grantor, it amounts to an *assignment*, and is not an underlease; and a right of entry, or a reservation of rent, will not change the nature of the estate. (*Palmer v. Edwards*, Doug. 187, n.) And, on the other hand, if it leaves any portion of the estate in the lessor, even a day, an hour, or a minute, as a reversion, it is an underlease, and therefore an instrument purporting to be an assignment for the residue of a term, reserving the last day or hour, will operate as a lease of this description. (2 Prest. Con. 124.) But it seems that the reservation of a former part of the estate; as to hold, for example, from a day to come or from an event to happen, unless it is to happen on the death of the person by express limitation (*Jermin v. Orchard*, Show. P. C. 199), will not prevent the instrument from taking effect as an assignment. (2 Prest. Con. 125.) And notwithstanding that when the *habendum* limits the estate to commence at a future period, there is an evident repugnance between the grant which limits all the assignor's interest, and the *habendum* which directs that it shall commence at a future period—it being essential to the validity of an assignment that it should pass an *immediate* interest—still this will not avoid the assignment, which will take effect instantly, and the *habendum* will be rejected for repugnancy, upon the long-established principle, that where there is any repugnancy between the premises and the *habendum*, the former

shall be retained and the latter rejected. (Flow. 524.)

Usual covenants contained in assignments.—In assignments, as in ordinary conveyances of the fee, the assignor qualifies his covenants for title to his own acts, and those of the parties through whom he claims, or who shall claim through him. Such covenants usually run thus, viz.: that the lease is valid—that all outgoing, such as rent and taxes, have been paid, and all covenants and conditions performed—that the vendor has good right to assign—for quiet enjoyment—freedom from incumbrances—and for further assurance. The usual covenants on the part of the purchaser are, to pay rent and perform the covenants reserved and contained in the lease, and to save the assignor harmless therefrom, and for which, as we have already seen, he remains liable to the lessor, notwithstanding the assignment of his estate, and the actual acceptance by the lessor of such assignee as his tenant. Where only a portion of the property contained in the original lease is sold, then the party who is to have the possession of the lease enters into a covenant with the other party for its production.

Of limited interests in terms of years.—Estates for years are often the subject of settlements, for though, strictly speaking, an estate tail cannot be created out of them, as that can only be done of estates of inheritance, still terms of years may be so settled as to answer the purposes of an entail, and be rendered unalienable for almost as long a time as if they really were entailed, in the strictest sense of the term. This may be done, either by

deed of trust, in executory devise, provided no attempt be made to tie up the property beyond the duration of lives in being, and twenty years after (*Long v. Blackall*, 3 Ves. 486; *Newcastle (Duke of) v. Lincoln (Countess of)*, 3 ib. 317; *Thelluson v. Woodford*, 4 ib. 232); and perhaps, in the case of a posthumous child, a few months more; a limitation of time not *arbitrarily* prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be limited by way of remainder, so as to postpone a complete bar of the entail for a longer period. If, therefore, the executory limitations be on contingencies too remote, the whole property will vest in the first taker, and the limitations over will fail altogether (*Ware v. Polhill*, 11 Ves. 257); and, generally speaking, if the property be limited in terms which if it were freehold property would create an estate tail, it will give the absolute interest in chattels, as well real as personal, and all the subsequent limitations will be void (*Freyes v. Robinson*, Bunb. 38; *Bennett v. Lewknor*, Roll Rep. 356; *Love v. Wyndham*, 2 Cha. Rep. 14; S. C. 1 Lev. 290; *Richards v. Bergavenny*, 2 Vern. 324; *Seale v. Seale*, Pre. Cha. 421; *Doe v. Dickenson*, 8 Vin. 451, pl. 25; *Stratton v. Payne*, 2 Eq. Ca. Abr. 325; *Butterfield v. Butterfield*, 1 Ves. sen. 133; *Hodgeson v. Bussey*, 2 Atk. 82; *Beauchlerk v. Dormer*, ib. 308; *Read v. Snell*, ib. 642; *Sabberton v. Sabberton*, For. 245; *Glover v. Strothoff*, 2 Bro. C.C. 33; *Robinson v. Fitzherbert*, ib. 127; *Chatham (Earl of) v. Daw Tothill*, 7 Bro.

P. C. 453; *Chandless v. Price*, 3 Ves. 99; *Croke v. De Vandes*, 9 ib. 197; *Ware v. Polhill*, 11 ib. 257; *Elton v. Eason*, 19 ib. 73; *Bennett v. Tankerville (Earl of)*, ib. 170; *Southampton (Lord) v. Hertford (Marquis of)*, 2 Ves. & Bea. 63; *Brouker v. Bagot*, ib. 574; *Britton v. Twining*, 3 Mer. 176; *Crawford v. Trotter*, 4 Mad. 360); so that in point of fact in the case of a term of years and personal chattels, the vesting of an interest which in freehold property would be an estate tail, bars the issue and all subsequent limitations as effectually as a fine and recovery would formerly have done, and a disentailing deed would now do, in the case of estates entailable within the statute *de Donis*. Lord Coke, however, in *Leonard Lovie's* case seems to have taken a distinction between a term in gross, and a term *de novo* out of the inheritance; and to have considered that a limitation of a term *de novo* to a man and the heirs of his body shall enure no longer than he has heirs of his body. (10 Rep. 87.) But this distinction has been long since exploded. In *Burgis v. Burgis* (6 Mod. 115), Lord Keeper Finch said he did deny Lord Coke's opinion in *Leonard Lovie's* case, and Lord Nottingham expressed a similar opinion in the *Duke of Norfolk's* case (3 Cha. Cas. 1), the correctness of which has never once been doubted. But although, generally speaking, the same words which would create an estate tail in freehold property will pass the absolute interest in a term of years, and this equally whether the terms employed would have been sufficient to create an estate tail expressly, or have raised it by implication (*Lamb v. Archer*, Salk.

215; *Wilkinson v. South*, 7 T. R. 555), still in the construction of a will disposing of a term, or other chattel property, the Courts have allowed words to control the usual and technical import of the words "dying without issue," or other similar expressions, to the death of the first devisee, which they would not formerly have done in the case of a devise of real estate, though now, since the late Will Act, 1 Vict. 1, c. 26, the dying without issue, if limited so as to confine it to the death of the party, would, as to devises subsequent to the year 1837, be confined to the death of the first taker, in the case of freehold estate, as well as in a term of years (39, and see *antè*, vol. 1, p. 270). The reason for adopting this construction in the case of chattel interests was to give effect to the limitations over, which, as we have already seen, could not have taken effect if the first limitation had been construed sufficient to pass an estate tail; and hence, although in a devise of freeholds the words "leave no issue," or, "leaving no issue," would have been considered insufficient to have confined the dying without issue to the time of the decease of the first taker (*Forth v. Chapman*, 1 P. Wms. 663; *Dansey v. Griffith*, 4 Man. & Selw. 61), yet in the case of bequests of personal estate, and for the reasons above laid down, the construction would have been different. This, as we have already seen, is fully exemplified by the case of *Forth v. Chapman*, vol. 1, p. 270, where the words "leaving no issue" were taken in two different senses as to the two different species of property, and as to the freehold to be construed to mean a dying without issue generally, and as to the

leasehold, to be confined to the death of the first taker. (*Atkinson v. Hutchinson*, 3 P. Wms. 258; *Reed v. Snell*, 2 Atk. 642; *Lampley v. Blower*, 3 ib. 396; *Goodtitle v. Pegden*, 2 T. R. 720.) In addition to this, the Courts in many cases have allowed other expressions, where the intent has been apparent, to confine the dying without issue to the death of the first taker, so as to give effect to the ulterior limitations (*Pinbury v. Elkin*, 1 P. Wms. 563; *Stratton v. Payne*, 3 Bro. P. C. edit. Toml. 99; *Sheffield v. Orrery*, 3 Atk. 282; *Trotter v. Oswald*, 1 Cox, 317; *Wilkinson v. South*, 7 T. R. 555; *Smith v. Frederick*, 1 Russ. 174); for if the contingency of dying without issue depends upon the life or lives of persons in being, an executory bequest limited thereon will be good. (*Lamb v. Archer*, 1 Salk. 225.) Thus if the limitation over is only for life (*Oakes v. Chalfont*, Pollex. f. 33; *Trafford v. Boehm*, 3 Atk. 449), or to the survivor of one, of two, or more persons (*Nicholls v. Skinner*, Pre. Cha. 258; *Sayer v. Hughes*, 1 P. Wms. 534), or the dying without issue is limited to the death of the first taker under twenty-one (*Thoustout dem. Small v. Denny*, Wils. 270), or to the death of the testator himself (*French v. Cadell*, 2 Bro. P. C. 257; *Wellington v. Wellington*, 1 Blac. 645), the contingency must necessarily take place during the lives of persons in existence at the time of the testator's death, and thus fall within those limits which the law permits for the vesting of an executory devise.

Assignments by will.—As wills of personal estate were not within the Statute of Frauds, leasehold

property might have been assigned not only by an unattested will (Swin. 558; Shep. Touch. 408; Gilb. 92; God. pt. 1, c. 1, s. 7; *Wright v. Walthoe*, Com. Rep. 452; *Worlick v. Pollett*, before the Delegates, 1711; *Loveday v. Claridge*, Com. 452; *Ex parte Dy*, 1 Hagg. 219; *Walker v. Walker*, 1 Mer. 515; *Salmon v. Hays*, 4 Hagg. 382); but even by a mere unsigned writing, written by the testator himself, or by some other person by his direction (*Worlick v. Pollett*, and other cases cited in *Limberry v. Mason*, Com. Rep. 452; 2 Black. Com. 501; *Rymes v. Clarkson*, 1 Phill. 22; Went. c. 1, p. 15, 14th edit.; Wms. Exors. 54); but now, under the late statute 1 Vict. c. 26, s. 9, the same solemnities are required in a will of personal as of real estate. In the case of a will of personal estate, the probate affords satisfactory proof that the will is legally executed; still, in order to confer a good title to a term of years thereby bequeathed, it must also be shewn that such probate was obtained in the proper ecclesiastical court; and, further, that the executor assented to such bequest. Where questions have most frequently arisen in cases of probate or administration, is where a term has been vested in a trustee whose representatives have proved the will, or taken out administration in a court which has no jurisdiction over the land included in the term (*Re Mary Powell*, 3 Hagg. 195); for it often happens that the personal representatives of a deceased trustee are ignorant altogether of his being a trustee of a term, and therefore merely prove his will, or take out administration with reference to the assets which the testator or intestate

takes in his own character, without reference to those which he takes as a trustee. The chances also of errors of this kind are considerably increased in consequence of the number of courts that have jurisdiction of the assets of testators or intestates. A very clear and correct statement, as to the proof of wills and taking out administration in cases of terms of years, is given by the real property commissioners in their second report, p. 67, *et seq.* where it is laid down "that a will must be proved, or letters of administration taken out in the court of the ordinary who has jurisdiction over the assets of the testator or intestate." In the case of a trustee of a term, if all his effects, including the land in the term, are within the jurisdiction of the same court, out of that court should the probate or administration issue. If he leaves personal effects in one diocese or peculiar, the land in the term being in another diocese or peculiar within the same province, either Canterbury or York, probate or administration should be obtained in the Prerogative Court of that province. If he leaves effects within one of the two provinces, and the land in the term be within the other province, probate or administration must be obtained either in the Prerogative Court of that province, or in an inferior court, as circumstances may require; but, on account of the term, probate or administration must be obtained either in the Prerogative Court of the other province, or, if he had no other assets besides the term, in the inferior court of the ordinary having jurisdiction over the place where the land in the term is situated.

Defect where will is proved in wrong court, how cured.—If the will of a deceased trustee of a term be proved in an inferior court not having jurisdiction over the place where the land in the term is situated, or in an inferior court having such jurisdiction, when the testator left other assets out of that jurisdiction, but within the same province in which the land in the term lies, or in the Prerogative Court of one province, when the land in the term is within the other province, and the executor so proving should assign the term; yet although he could make the assignment, no use could be made of it, as the probate he had obtained would not, in proving the title to the term, be admitted as evidence to prove that he was executor. But the assignment, though made by an executor who, as to the term, has not proved the will in the proper court, will be rendered available, if the will should, either in the lifetime of the executor, or after his decease, be proved in the court to which it ought to have been originally proved with reference to the term, as part of the assets of the testator; for then such subsequent probate would be admissible in evidence. (*Ib.*) But the assignment from a person who has administered in a wrong court would be absolutely void. (*Ib.* 68.)

Recent practice to avoid the transmission of a will of a trustee to the Prerogative Court, where it has been proved in the wrong one.—If all the assets of a deceased trustee of a term, including the term, be in the same province, and his will be proved in an inferior court not having jurisdiction over the place where the land in the term is

situated, or in an inferior court whose jurisdiction embraces the land in the term, but does not extend to the other assets, according to a practice recently adopted, to avoid the transmission of the will from the inferior Court to the Prerogative, letters of administration limited to the effects of the deceased trustee, so far as regards the term, are granted by the Prerogative Court to some person, for the purpose of assigning the term; and in that case the title to the term, even if it should have been previously assigned by the executor of the trustee, is traced from the trustee through the medium of the assignment from the limited administrator (*Ib.*) If a trustee of a term has died intestate, and it afterwards becomes requisite to have the term assigned, and there is then no administrator of the deceased trustee, or one who derives his qualification from a court whose jurisdiction does not embrace the land in the term, it is usual in these cases to obtain letters of administration, limited to the effects of the trustee, so far as regards the term; and in cases of this kind, administrations from the Prerogative Court are to be preferred, because an administration granted by a Prerogative Court, even when it has no authority to grant it, is good till repealed, and all the mesne acts of the administrator are valid; but an administration granted by an inferior Court, when the same ought to have been granted by the Prerogative Court, is absolutely void, and all the mesne acts of the administrator are invalid; so that the assignment of the term by the limited administrator from the Prerogative Court would stand good,

although that Court, supposing the intestate not to have left assets, including the term, in more than one inferior jurisdiction, may have exceeded its authority in making the grant; on the other hand, the assignment of the term, by the limited administrator from the inferior court, would be absolutely void, if it should afterwards be discovered that the intestate left assets in more than one inferior jurisdiction.

Executorship when transmissible.—Important questions sometimes arise with respect to the transmission of the interest from one executor to another; in order that it may be so transmissible, it is necessary that the first executor should have proved the will of his testator, which, having done, he may then transmit the interest vested in him as such executor to his own executors; or, in other words, the executor of an executor having proved the will, is the executor or personal representative of the first testator. (Bro. Abr. tit. Administrator, pl. 7.) But in order to render himself so he must prove the will of his own testator in the proper court, and, upon this subject, it must be confessed, the cases are somewhat contradictory.

In *Fowler v. Richards* (5 Russ. 39), Sir John Leach held, that where a testator's will is proved in the Prerogative Court of Canterbury, and the surviving executor's will is proved in the Diocesan, the executor of the executor is the representative of the original testator, and that it was not necessary that the second will should be proved in the Prerogative Court. Sir L. Shadwell seems, however, to have thought differently, and in *Jernegan v. Baxter* (5 Sim.

568), he said that, before he acted upon *Fowler v. Richards*, he should direct a case for the opinion of a court of law. And the prevailing opinion now certainly seems to be, that where a testator's will is proved in the Prerogative Court, and his executor's will is proved in the Diocesan Court, the executor of the executor is not the personal representative of the original testator. (*Twyford v. Trail*, 7 ib. 92; *Williams v. Bland*, Law T. May 9, 1846.)

Representation not transmissible through administrators.—It must always be kept in mind that transmissions of this kind can be only carried on through executors; for the administrator of an executor of A (*Ley v. Anderton*, Sty. 225), or the executor of the administrator of A, is not A's personal representative. (*Ib.*) An administrator is merely an officer of the ordinary, in whom the deceased has not reposed any trust, and therefore, on the death of such administrator, it results back to the ordinary to appoint another. In these cases, therefore, where the course of a presentation from executor to executor is interrupted by an intestacy, it becomes necessary that the ordinary should grant a new administration of the goods of the deceased, not administered by the former executor or administrator, as the case may be; and such administrator *de bonis non* will then become the legal representative of the deceased. (Selw. N. P. 736.) The cases where an administration of this kind will be necessary, are:—1. Where the executor of the deceased, having proved the will, dies intestate, without having fully administered the personal estate of his testator. (*Wankford v. Wankford*,

Salk. 299, 305.) 2. Where there are several executors, and the surviving executor, having proved the will, dies intestate. (Bro. Abr. Exors. pl. 14.) 3. Where the administrator dies before he has administered the whole personal estate of the deceased. (*Hirst v. Smith*, 7 T. R. 182; Selw. N. P. 786.)

Property taken in the character of executor not subject to forfeiture.—As an executor or administrator is considered as holding in right of his testator or intestate, and not in his own right, the interest which he takes in such property in his representative capacity will not be subject to forfeiture by his being attainted of treason or felony, or be liable to be taken in execution for his own proper debt. (Off. Exors. 85; Toll. Exors. 133; *Rutland v. Rutland*, 2 P. Wms. 212; *Marlow v. Smith*, ib. 200; *Farr v. Newman*, 4 T. R. 621.) Neither in case of his becoming a bankrupt, will his interest as executor be thereby affected. Nor, as I have already remarked, will a term which he takes as executor, merge in the reversion which he has in his own right. (*Antè*, vol. 1, p. 368.) Upon the same principle also, if an executrix marry, although the personal chattels which she is possessed of in her own right will become vested absolutely in her husband, yet with respect to the goods of the testator, they will not be transferred by the marriage (Off. Exors. 87; Toll. Exors. 185; Co. Litt. 351; 1 Rep. Husband and Wife, 187); still for all this the husband is entitled to administer to her testator's effects in his wife's right, and this for his own safety, lest she should misapply the funds, for which he would be liable (*Arnold v. Bidgood*, Cro.

Jac. 318; *Levick v. Coppin*, 2 Black. Rep. 801; S. C. 3 Wils. 277); nor will she be permitted to administer to them without his concurrence. (*Anon. Salk.* 282.)

Assent of the executor.—A term of years, although specially devised, does not, as I have just before remarked, vest absolutely in the devisee, until the executor has assented to the bequest; still, a devisee has such an inchoate right or interest in the term, that if he were to die before such assent was given, his interest would be transmissible to his representatives (*Went. Off. Exors.* 69; 2 Wms. Exors. 982); and as such be subject to forfeiture, in case of the outlawry of the legatee. (*Toll.* 308.) This assent of the executor may be either express or implied, the law having prescribed no precise forms by which it is to be given, or from whence it is to be inferred. It seems, however, that if the executor informs the devisee that he intends him to take the term according to the will, it will be sufficient. (*Shep. Touch.* 456; *Hawkes v. Saunders*, Gow. 293; 2 Wms. Exors. 985.) An assent may also, it seems, be implied from the devisee of the term entering on the property, and exercising acts of ownership over it, without any complaint or objection by the executor. (*Richardson v. Giffard*, 1 Add. & Ell. 52; S. C. 3 Nev. & Man. 325.) And if an executor assent to a bequest to one for life, this will enure equally to those in remainder; and, *à converso*, for the particular estate and remainders constitute but one estate. (*Welchden v. Elkington*, Plow. 251; *Lampet's case*, 10 Co. 47, b; *Adams v. Pierce*, 3 P. Wms. 12;

Com. Dig. tit. Admon. C. 6.) So an assent to a bequest of a lease for years is a consent to a condition or contingency annexed to it; as if a devise be to the testator's widow so long as she continues unmarried; and if she marry, then of a rent payable out of the land; the executor's assent of the devise of the term is an assent to that of the rent in case of the devisee's marriage. (*Goffe v. Heywood*, 1 Roll. Abr. 620, tit. Dev. (E) pl. 2; S. C. 1 Roll. Rep. 247, 368; S. C. by the name of *Gough v. Howarde*, 3 Bulstr. 121; S. C. by the name of *Gouge v. Hayward*, Bridg. 52.) So an assent to the devise of a chattel real is an assent to a devise of a rent out of it. (Com. Dig. Admon. c. 6.) But if a lessee for years bequeaths a rent to A, and the land to B, it has been doubted whether the executor's assent that A shall have the rent is an assent that B shall have the land. (3 Bulstr. 122; Bridg. 55; Plow. 251, b.) However, it is said to be now established, that in this case also an assent to the bequest to one shall enure to the benefit of the other, on the ground that as the assent of the executor is required as well for the benefit of creditors as for his own, an inference arises from his assent to one of the legatees of the specific property, that he had no occasion for the term or rent to pay debts; for if he had, then his assent to either of the legatees would be improper, as both ought to abate *pro rata*. (1 Rop. Leg. 738, 3rd edit.; 2 Wms. 986.) The assent of any one of the executors, where there are several, is sufficient (2 Wms. Exors. 987); such assent may be given even before probate of the will (God. pl. 2, c. 20, s. 1;

Went. Off. Exors. 82, 14th edit.), and, generally speaking, such consent, if once given, cannot afterwards be retracted; but, at the same time, it seems that if such assent has not been completed by possession, and its recall is unattended with injury to a third person, as to a *bond fide* purchaser from the legatee on the faith of such assent, it seems only reasonable that the executor under particular circumstances should have the power of retracting it; as where he assents upon a reasonable ground for considering that the assets are sufficient to answer all demands, but unknown debts are unexpectedly claimed which occasion a deficiency. (1 Rop. Leg. 743, 3rd edit.; 2 Wms. Exors. 988.) But in no case would such retraction be allowed as against a *bond fide* purchaser for valuable consideration. If an executor refuses his assent without cause, a court of equity will compel him to give it. (Com. Dig. Admon. c. 6.)

Executors and administrators have an absolute power over a term of years.—Executors and administrators have, as I have before remarked, an absolute power of disposition over a term of years, of which their testator or intestate died possessed (*anté*, vol. 1, p. 191), even although it be specifically bequeathed by his will, and may therefore sell and assign the same to a purchaser, who is not in anywise bound to see to the application of the purchase-money. (*Ewer v. Corbet*, 1 P. Wms. 148; *Burting v. Stonard*, 2 P. Wms. 150; *Nugent v. Giffard*, 1 Atk. 463; *Langley v. Oxford* (Lord), Amb. 17; *M'Leod v. Drummond*, 17 Ves. 161; *Andrew v. Wrigley*, 4 B. & C. 125; *Coote, Mrtge.* 198; *Wms. Exors.* 670.)

2. *Attendant Terms.*

The title of an attendant term should be investigated as closely as the title to the fee. It should be ascertained that it was well created; that the *mesne* assignments were properly effected; that, where a will or intestacy occurs, the will was proved, or administration obtained in the proper court; and that no act has been done by which such term may be surrendered or merged. In small properties, indeed, a declaration of trust was often relied on as sufficient. This was a most unsafe practice, as it would have afforded no protection whatever against a subsequent purchaser, without notice, for valuable consideration, who had obtained an assignment of the term. It often also happens that several attendant terms are kept on foot; and whenever this occurs, the title of the whole of them should be investigated, when, if it should appear that any of the elder terms are merged, or surrendered, or cannot be safely relied on, then it should be ascertained whether one of later creation can be confided in. An attendant term is often of the utmost importance to titles, as it will protect a *bona fide* purchaser for valuable consideration from all estates and charges made from the time of its creation down to the time of his purchase. This subject will, however, be more entered into when we come to treat of the equitable protection of purchasers.

When a term will be presumed to be surrendered or merged.—It will be proper, nevertheless, to make a few brief observations here upon the presumed surrender, as also upon the merger of satisfied terms. With respect to the former subject, the question is by no means satisfactorily settled.

It appears, however, to have been determined that where it was for the interest of the owner of the inheritance that a satisfied term should be considered as surrendered, and that no beneficial purpose could be answered by the continuance of the term, a surrender might be presumed. (Selw. N. P. 699; Step. N. P. 1557; Roscoe, 429; *Doe v. Staple*, 2 T. R. 696; *Doe v. Sybourn*, 7 *ib.* 2.) Thus in *Doe dem. Burdett v. Wrighte*, 2 B. & A. 710 (*antè*, also, 2 B. & Ald. 756), a term of 1,000 years was created by deed, in 1717, and in 1735 was assigned for the purpose of securing an annuity to A, and after that *to attend the inheritance*. A died in 1741, and the estate remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been in the meantime taken of the term, except that in 1801 the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for.

The judge directed the jury to presume a surrender, and on motion for a new trial, it was held, that under these circumstances, the direction was proper, and the jury were warranted, on ejectment brought for the premises by the heir-at-law, to presume a surrender of the term. In *Doe dem. Putland v. Hilder*, also, 2 B. & Ald. 782, a term of years was created in 1762, and assigned over to a trustee in 1779 to attend the inheritance. In 1814 the owner of the inheritance executed a marriage settlement, and in 1816 he conveyed his life interest in the estate to a purchaser as a security for a debt; but no assignment

of the term, or delivery of the deeds relating to it, took place on either occasion. In 1819 an actual assignment of the term was made by the administrator of the original trustee to a new trustee, for the purchaser in 1816. On ejectment brought against the purchaser by a prior incumbrancer, the judge directed the jury to presume a surrender, and the jury having found accordingly, a rule nisi was granted for a new trial; and, after argument, it was holden that the direction was right, and that the jury were warranted in presuming that the term had been surrendered before 1819. The correctness of this decision was, however, disapproved of by Richards, C. B., Graham, B. and also Lord Eldon (see note *a*, 2 B. & Ad. 577); the latter of whom, in alluding to the case of *Doe v. Hilder* (*suprà*), said, he had no hesitation in declaring that he would not have directed a jury to presume the surrender of the term in that case; and for the safety of titles to landed estates in this country, he thought it right to declare that he did not concur in the doctrine laid down in that case. And in *Doe dem. Blacknell v. Plowman* (2 B. & Ad. 573), in which both *Doe dem. Burdett v. Wrights* and *Doe v. Hilder* were cited, Lord Tenterden, C. J. said, the doctrine laid down in those cases had, he believed, been much questioned, and which, he said, were directly in point in the case then before him; and as he and the rest of the Court there decided against the presumption of the surrender, the former decisions may now be considered as overruled. *Doe dem. Blacknell v. Plowman* was shortly as follows:—

In 1772, a term of 1,000 years was created by deed, for the purpose of securing a sum of 5,000*l.*; and in 1787, the principal and interest having been paid, the residue of the term was assigned in trust for the devisees of the persons who created the term. In 1789, the premises were conveyed to the purchaser by deed, and the residue of the term was assigned in trust for the purchaser, her heirs or assigns, or as she should appoint, and in the meantime *to attend the inheritance*. The purchaser entered into the possession of the premises, and continued so possessed till her death. In 1808, she executed a marriage settlement, reserving to herself a power of appointment by deed or will, and after the marriage she, in 1815, devised all her real estate. Neither in the marriage settlement, nor in the will, was any mention made of the term of 1,000 years. She and her husband having both died, it was holden, on ejectment brought by her heir-at-law, that there was no ground whatever for presuming that this term, *which was assigned to attend the inheritance*, was ever surrendered. Neither will the mere circumstance of the term having been satisfied afford sufficient ground for a jury to presume its surrender. (*Evans v. Bicknell*, 6 Ves. 185, Rosc. ed. 430.) To authorize such a presumption, there ought to be some dealing with the term. Upon the whole, therefore, it seems that if a term has been once expressly assigned to attend the inheritance, subsequently to which no act has been done inconsistent with its existence, there will be no ground for presuming it to be surrendered on account of mere

lapse of time, and the silence of the party entitled to the inheritance concerning it. It may be proper also to remark that a deed purporting to be an assignment of an old term, may, if that term by any accident has ceased, operate as the creation of a new one. (*Dean v. Kemys*, 9 East, 336; *Doe v. Brooks*, 3 Ad. & Ell. 513.) It has sometimes happened that the trustee of a term has had the freehold conveyed to him in order to make him a tenant to the *præcipe* for the purpose of suffering a recovery, from whence questions have arisen as to whether or not the term became merged; but it has been decided that the term would not become actually drowned, but merely remain in a state of suspended animation until resuscitated by the recovery being duly suffered and perfected. (*Ferrers v. Fermor*, 2 Roll. Rep. 245; S. C. Cro. Jac. 643; *Teme's case*, 1 Vent. 280, cited.)

Operation of recent enactments.—By the recent statute 8 & 9 Vict. c. 112, every satisfied term of years, which either by express declaration, or by construction of law, shall, upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid; except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action,

suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the 31st day of December, 1845, and shall, for the purpose of such protection, be considered in every court of law and equity to be a subsisting term. (Sec. 1.) By the section immediately following (sec. 2), it is also enacted, that every term of years then subsisting, or hereafter to be created, becoming satisfied after the 31st day of December, 1845, and which, either by express declaration, or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall, immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid.

SECTION III.

COPYHOLD AND CUSTOMARY ESTATES.

A COPYHOLDER being in the eye of the law merely a tenant at will, he had no interest which he could transfer to another; all he could do was to relinquish his own right to the property. When, therefore, he was desirous of passing his estate to a third party, he surrendered the premises into the hands of the lord, under confidence that the latter would regrant them to the person he himself should name, until, in course of time, this mode of alienation became so well established, that if the lord refused to regrant them after accepting such resignation under such confidence, a court of equity would have enforced the trust. (Wat. Cop. 50.) By custom also copyholds became descendible, and governed by the same rules as the descent of estates of freehold. (Co. Cop. s. 50; *Brown's case*, 4 Co. 22, a; *Brown v. Dyer*, 11 Mod. 98; S. C. Holt, 165.) But as copyholds are not within the statute *de donis* (Cary, 30; Sav. 67; *Rowden v. Malster*, Cro. Car. 42), it seems doubtful whether they can be entailed, unless there is a special custom in the manor to warrant it; in the absence of which, the better opinion seems to be, that a limitation in terms that would create an estate tail in freeholds, will create a fee-simple conditional in copyholds.

(*Scriv. Cop. 67, et seq.*; *Heydon's case*, 3 Co. 8; *Margaret Podger's case*, 9 Co. 105; *Bulleyn and Grant's case*, 1 Leon. 175; *Warne v. Sawyer*, 1 Roll. Rep. 48; *Gravenor v. Brook*, Poph. 33; S. C. by the name of *Gravenor v. Rake*, Cro. Eliz. 307; *Lee v. Brown*, Poph. 128; *Erish v. Rives*, Cro. Eliz. 717; *Hastings and Grey*, cited, ib.; *Taylor v. Shaw*, Carth. 22; S. C. 1 Sid. 268; *Roe dem. Crowe v. Baldwere*, 5 T. R. 104; *Moore v. Moore*, 2 Ves. 601; S. C. Ambl. 279.) Neither is the widow of a copyholder dowable except by custom, and the interest she thus takes is styled her freebench; the quantity and duration of which will be regulated by the custom of the manor. She does not acquire this right by her marriage, as in the case of dower of freeholds, for she is entitled to freebench only in the event of her husband's dying seised (*Brown's case*, 4 Co. 22; *Benson v. Scott*, 4 Mod. 251; 12 ib. 49; S. C. Carth. 275; *Walter v. Bartlett*, 2 Roll. Rep. 179; *Howard v. Bartlett*, Hob. 181; *Waldoe v. Bertlet*, Cro. Jac. 573; *Parker v. Bleeke*, Cro. Car. 568; *Goodwyn v. Winsmore*, 2 Atk. 526); consequently, this right may be defeated by a disposition by her husband in his lifetime. (*Benson v. Scott*, 4 Mod. 251; 12 ib. 49; S. C. Carth. 275; *Sutton v. Stone*, 2 Atk. 101.) And any act of his for a valuable consideration, will have this operation equally with a legal surrender. (*Hinton v. Hinton*, 2 Ves. 631; S. C. Amb. 454; *Brown v. Raindle*, 3 Ves. 356.) Freebench will also be destroyed by the bankruptcy (*Parker v. Bleeke*, Cro. Car. 568); as also by the forfeiture of the husband's estate. (*Allen v. Brach*, Winch.

27; *Roe v. Hicks*, 2 Wils. 13.) Neither will she be entitled to freebench out of the trust of a copyhold estate. (*Forder v. Wade*, 4 Bro. C.C. 521.) Her title to freebench will also be defeated by a surrender of the husband to the use of his will (*Forder v. Wade and Others*, 4 Bro. C.C. 251); but a devise by an unsurrendered will would not have produced this result; neither, it seems, has the statute 55 Geo. 3, c. 192, which dispenses with a surrender to the uses of a will, made any alteration in the law in this respect, as that statute only supplies a defect in form, and not in substance. (*Doe dem. Neithercote v. Bartle*, 5 B. & A. 492; 1 Dow. & Ry. 81; but see *Doe dem. Clarke v. Ludlam*, 5 Moo. & Pay. 48; 7 Bing. 275.) And it has been clearly determined, that a devise which by the special custom of some few manors, was good without a surrender, even before the statute above referred to, did not defeat the widow of her freebench; for in those instances the devisee took not by the surrender, but by the will; and, consequently, after the wife's right had attached. (Scriv. Cop. 91; see also *Forder v. Wade*, 4 Bro. C.C. 521.) Still, it seems, that under the provisions of the late Dower Act (3 & 4 Wm. 4, c. 105), and the more recent Will Act (1 Vict. c. 26, s. 4), a husband is empowered to defeat his wife's title to her freebench, by a will to the uses of which no surrender has been previously made. A jointure before marriage in lieu of dower, or thirds out of any lands of freehold or inheritance, will be an equitable bar to her claim of freebench. (*Walker v. Walker*, 1 Ves. 54.) Yet it must be remem-

bered, that all these general customs may vary, and bend to special customs within the manor to the contrary.

Curtesy.—Curtesy, like freebench in copyholds, cannot exist except by custom; and by that custom must its extent and duration also be governed. (*Ever v. Aston*, Mo. 271; S. C. 1 And. 192, by the name of *Ever v. Astwicke*.) Mr. Watkins, in his valuable treatise on copyholds, seems to have considered that where the custom does not expressly require that there should be issue, the birth of issue is not essential to give the husband a title. But a modern writer of high authority expresses a strong opinion that when curtesy is allowed, if the custom is silent with respect to the issue, the rule of common law would prevail. (See Scriv. Cop. 98.) It seems, however, that where, by the custom of a manor, the husband is entitled to curtesy, he will be so entitled, although the wife die before admittance. (*Doe dem. Milner v. Brightwen*, 10 East, 583; see also Gilb. Ten. 288.)

Copyholds how affected by judgments.—Copyholds were not formerly liable to simple contract, or even specialty debts, and therefore were unaffected by judgments (*Drury v. Man*, 1 Atk. 95; *Rex v. Lisle*, Park. 195; Lex Cust. 19; *Morris v. Jones*, 2 B. & C. 242; S. C. 3 Dow. & Ry. 603; see also *Cannon v. Pack*, 2 Eq. Ca. Abr. 226; see also Scriv. Cop. 60; *Rex v. Budd*, Park. 190; *Parker v. Dee*, 2 Cha. Cas. 201; *Robinson v. Tonge*, 1 P. Wms. 680, n.; *Aldrich v. Cooper*, 8 Ves. 388, 394), yet they might have been taken under a sequestration from a court of equity (*Col-*

ston v. Gardner, 2 Cha. Cas. 46; 3 Swanst. 279, 282, n.; *Caermarthen (Marquess of) v. Hewson*, ib. 294, n.; *Dunkley v. Scribnor*, 2 Mad. 444; but now under the recent enactment (1 & 2 Vict. c. 110), judgments are made a charge upon copyholds in like manner as they are thereby also made chargeable upon freehold estates; a subject I shall treat more fully upon hereafter.

A copyholder, we have already seen, is unable to grant leases without the license of the lord. (Vol. 1, p. 159.) And being impeachable for waste, he is also disabled from opening mines or cutting down timber.

Customs.—In investigating the titles of copyhold property, the custom of the manor oftentimes becomes a most important question; for upon this the very origin of the grant must frequently depend, as must also the course by which the property is to be transmitted from one party to another. In order that a custom may be good:—1. It must have existed time out of memory. (*Kempe v. Carter*, 1 Leon. 56; Co. Litt. 58; *Jackman v. Hoddleston*, Cro. Eliz. 351; *Rex v. Inhabitants of Wilby*, 2 M. & Selw. 509.) 2. It must be reasonable. (Scriv. Cop. 28; Wat. Cop. 54; *Badger v. Ford*, 3 B. & A. 155; *Arlott v. Ellis*, 7 B. & C. 365.) 3. It must be certain. (Ib. and see Co. Cop. s. 33.) 4. It must be compulsory. (Wat. Cop. 560.) And, 5. It must not be inconsistent with another custom, though it may be subservient to another's right. (*Bateson v. Green*, 5 T. R. 411.) It must always be remembered, that if any part of a custom be bad, it avoids the whole. (*Wilkes v. Broadbent*, 2 Str. 1225.)

What will be sufficient proof of a custom.—With the exception of the general customs of gavel-kind and borough English, which are noticed by the law (Rob. Gav. b. 1, c. 3, p. 38; Co. Litt. 110, 175, b; Dy. 196), the proof of all customs rests with him who alleges it. (Wat. Cop. 58; Scriv. Cop. 32; *Clements v. Scudamore*, 1 Salk. 243.) And it will not be sufficient for him to prove merely that such a custom exists; for he must also shew that the lands in question are within and subject to that custom. (*Roberts v. Young*, Hob. 286.) The best and most direct evidence of a custom is that of a series of entries on the court rolls (Wat. Cop. 58); and, indeed, a single entry has been admitted as sufficient evidence as to a descent (*Doe dem. Mason v. Mason*, 3 Wils. 63), although, as a general rule, one undisturbed act does not create a custom. It may be evidence of a custom, but it will not create one. (*Roe dem. Jeffery*, 2 M. & Selw. 92.) So an ancient presentment by the homage of the custom entered upon the rolls, though no instance was adduced of any person having taken under it (*Roe dem. Beebee v. Parker*, 5 T. R. 26), and an ancient writing purporting to be such presentment or customary of the manor, delivered down with the court rolls from steward to steward, though never entered on the rolls, nor signed by any one, has been received. Still in all cases of custom, as many instances as possible of its having been acted upon should be produced. (Peake, Ev. 460.) When a doubt prevails as to the existence of a custom, it must be tried by a jury of the county in which the manor or place wherein it

is alleged is situate, and not by judges; except the same particular custom has been before tried, determined, and recorded in the same court. (1 Black. Com. 76; Wat. Cop. 56, 57; Scriv. Cop. 32; and see *Mortimer v. Petifer*, Cro. Jac. 302; *Jewell v. Horwood*, 1 Roll. Rep. 263; *Edwin v. Thomas*, 2 Vern. 75.) By the consent of all parties, however, a court of equity will order a reference to the master. (*Edwards v. Fidell*, 3 Mad. 239.) The customs of one manor cannot be received in evidence to prove or explain the customs of another (*Somerset (Duke of) v. France*, 1 Str. 659; *Ely (Dean and Chapter of) v. Warren*, 2 Atk. 189; *Roe v. Parker*, 5 T. R. 30; Wat. Cop. 59); unless in the case of an usage which is common to a whole country or district; as that of the border laws (5 T. R. 31), or the customs of miners (2 Atk. 189); though these last are properly the customs of such country or district, rather than of the particular manor in question, as *that particular manor*. (Wat. Cop. 59.)

Copyholds cannot be created at the present day.
—A copyhold estate cannot be created at the present day, because the custom, which constitutes the very life and soul of copyhold tenure, must have existed from time immemorial. By custom, however, a lord of a manor, with consent of the homage, may make new grants of waste land, parcel of the manor, to hold by copy of court-roll (*Northwick (Lord) v. Stanway*, 3 Bos. & Pull. 347); and such a custom is recognised by statute 4 & 5 Vict. c. 91. (Co. Litt. 58; *Kempe v. Carter*, 1 Leon. 56; *Revell v. Jodrell*,

2 T. R. 415.) Where a copyhold estate escheats to, or is surrendered into, the hands of the lord, he may regrant it to be held by copy of court-roll: nor is it necessary that the regrant should be made immediately; for the lord may, if he pleases, regrant the lands, even after a period of twenty years. (Co. Litt. 58.) But if the demesnes are once separated from the manor, so that the custom is destroyed,—as if the lord once grant a common-law interest for life, or years,—the copyhold property is destroyed for ever. (*French's case*, 4 Co. 31, and *Downcliffe v. Minors*, 1 Roll. Abr. 498, B.; *Lee v. Boothby*, Cro. Car. 521; *Badger v. Ford*, 3 Barn. & Ald. 155.) But if, on the premises coming into the hands of the lord, he regrants them to hold by copy, the custom of the manor again attaches and prescribes its extent with respect to the estate of the tenant. For the lord cannot exceed the limits prescribed by the custom; still for all this he may grant for a less, though he cannot grant for a greater, estate. (Co. Cop. s. 41, Tr. p. 90.) Thus, for example, if the custom warrants him to grant in fee-simple, he may grant to one and the heirs of his body, or he may grant to one for life, for years, on any lesser estate. (Co. Litt. 52, b; Co. Cop. s. 33, Tr. 65; *Bullock v. Dibley*, Co. Litt. 52, b; *Stanton v. Barnes*, Cro. Eliz. 373.) So where by the custom of a manor, the lord can grant a copyhold for three lives, he may grant it for one, for two, or for the three lives (*Smartle v. Penhallow*, 2 Lord Raym. 994; S. C. 1 Salk. 188); but if the custom be to grant for one life, a grant to

two jointly is not good, though it be in effect but for one of two lives. (*Gravenor v. Ted*, 4 Co. 23, a; S.C. by name of *Gravenor v. Brook*, Poph. 33; S. C. by name of *Gravenor v. Rake*, Cro. Eliz. 307.) The lord may, however, grant to a woman during widowhood under a custom to grant for life, that being in fact a lesser interest than a life estate. (*Down v. Hopkins*, 4 Co. 296.) There are in some manors both copyholds of inheritance and for lives (*Kempe v. Carter*, 1 Leon. 56); and such a custom is good; but a grant of the latter for lives, with a remainder in fee, would be void as to the remainder. (*Kitch*. 170; *Scriv. Cop*. 122.)

It is not requisite that the estate of the lord should be commensurate with the tenant's interest.—As immediately upon the regrant being made the tenant is in by the custom, it is not necessary that the estate of the lord should be commensurate with that of the tenant: hence the lord of a manor that hath a lawful estate therein, whether he be tenant for life or years, or even a mere tenant at will, may regrant a copyhold estate to be holden in fee-simple, and the grantee being in under the custom, his title will be paramount to the interest of the granting lord. For this cause, also, the estate so granted to be held by copy shall not be subject to his charges or incumbrances. (*Wat. Cop*. 45; *Swayne's case*, 8 Co. 63; *Podger's case*, 9 Co. 107; *Sammer v. Forcs*, 2 Browl. 208; *Cham v. Dover*, 1 Leon. 16; *Westmoreland's (Earl of) case*, 3 Leon. 59; *Sneyd v. Sneyd*, 1 Atk. 442.)

Custom as to the descent of copyholds.—In the absence of a custom to the contrary, copyholds of

inheritance will descend in the same course as freeholds; yet, by custom, they may be transmissible in a different course (*Brown v. Dyer*, 11 Mod. 28; *Roe dem. Crowe v. Baldwere*, 5 T. R. 104; *Goodwyn v. Spray*, 1 T. R. 466); and when such occurs, the customary mode of descent must be pursued; for it is out of the power of any individual to prescribe a mode of descent not sanctioned by the general rule of common law, or authorized by custom (Rob. Gav. b. 1, c. 5, pp. 92, 93; Co. Litt. 27; Scriv. Cop. 36; Wat. Desc.; *Baxter v. Dowdeswell*, 2 Lev. 138; *Fawcett v. Lowther*, 2 Ves. 302); consequently, if one seised of copyhold lands, descendible on the youngest son in the nature of borough English, were to surrender to the use of himself and his heirs, according to the course of common law, the words "*according to the custom of the common law*," would be void, and the youngest, and not the eldest, son would take the land. (Scriv. Cop. 36; Dy. 179, pl. 45.) Every custom, however, which prescribes a course of descent different from the rules and maxims of the common law, will be construed strictly. If, therefore, the custom of the manor be that the youngest son shall succeed as heir to his parent, he shall do so; but if the custom says nothing about the succession of a younger brother or nephew, the brothers or nephews must succeed according to the direction of the general law. (Wat. Cop. 60; Rob. Gav. b. 1, c. 6, p. 93; *Denn dem. Goodwyn v. Spray*, 1 T. R. 466.) Still it seems that a custom in favour of a younger brother, or a younger nephew, if it can be shewn by any

precedents to have been put in use, will be good. Thus in *Doe dem. Mason v. Mason* (3 Wils. 63), where the custom of descent was proved to extend to the youngest son, and if no son, to the youngest brother—and there was one instance only in favour of a youngest nephew—the plaintiff, who claimed as youngest nephew and heir by the custom, had a verdict, and the Court refused a new trial. And it should seem that, although the common-law course will prevail in collateral matters, where the custom is silent (Scriv. Cop. 35), it will nevertheless attach in the lineal descent; consequently, the issue of a younger son shall be preferred, in the descent of borough English lands to the issue of the eldest. (*Clements v. Scudamore*, 1 P.Wms. 63; S. C. 1 Salk. 243; 2 Ld. Raym. 1024.) So if the custom be that the eldest daughter shall inherit, and she die in the lifetime of the father, leaving issue a daughter, such issue is within the custom, and shall take place of her aunt. (*Godfrey v. Bullock* 1 Roll. Abr. 623.) And if the custom of the manor be that the lands of every *tenant of the manor dying seised* shall descend to the youngest son, or to the eldest daughter, and the ancestor never was a tenant of the manor, or did not *die seised*, the descent cannot be within the custom. Thus, if a tenant of a manor die seised of such lands, without issue, but leaving nephews and nieces (the children of his brother), the custom shall not extend to them; for they must make out their claim or pedigree through their father, who *was never a tenant of the manor*, and consequently could not have died seised; and besides all this,

they claim as *collaterals of the last dying tenant*; and are consequently without the custom in that respect also. (*Fane v. Barr*, 1 P. Wms. 63; *Denn v. Spray*, 1 T. R. 466.) It seems also that particular customs of descent will extend to equitable as well as legal estates (*Roberts v. Dixwell*, 1 Atk. 610; *Jones v. Reasbie*, Gilb. Uses, 19; *Edwin v. Thomas*, 1 Vern. 489; 2 ib. 75), except when restricted to an actual seisin at the time of the death. (*Clements v. Scudamore*, 1 Salk. 243.) But this customary mode of descent, though it will prevail in the case of a trust executed, yet it will be otherwise in the case of such trusts as are merely executory; as for example, where by marriage articles, lands in gavelkind, or borough English (*Starkey v. Starkey*, 7 Bac. Abr. 179), are agreed to be settled on A for life, with remainder to the heirs of his body, the common-law heir would become entitled under this settlement in preference to the customary heirs, and the settlement would be decreed to be made upon A for life, with remainder to his eldest son and the heirs of his body, with remainder to the second son and the heirs of his body. (*Roberts v. Dixwell*, 1 Atk. 606; see also *Payne v. Barker*, Sir Orl. Bridg. 18; Rob. Gav. b. 1, c. 6, p. 156; 2 Wat. Cop. 109; and see *ante*, vol. 1, pp. 294, 296.)

The rule in *Shelley's* case we have already seen is applicable to copyhold as well as to freehold estates. (See vol. 1, p. 298.)

Alienation of copyholds.—The legal estate in copyholds can only pass by surrender and admission (Wat. Cop. 50; Scriv. Cop. 151; *Knight v.*

Coke, 2 Ch. Cas. 43); hence copyholds cannot be exchanged by an ordinary deed of exchange at common law, but each must surrender to the use of the other, and be admitted accordingly. Yet an equitable estate in copyholds may pass by deed without either surrender or admission. (Wat. Cop. 60; Scriv. Cop. 262; *King v. King*, 3 P. Wms. 360; *Hawkins v. Leigh*, 1 Atk. 388; *Macey v. Shurmer*, ib. 389; *Tuffnell v. Page*, 2 ib. 38; *Car v. Ellison*, 3 ib. 73; *Allen v. Poultton*, 1 Ves. 121; *Gibson v. Montford (Lord)*, ib. 490; *Macnamara v. Jones*, 1 Bro. C. C. 481; *Roe v. Lowe*, 1 H. B. C. 461.) So, if a power or authority be given to a person, he may exercise it, and the vendee or appointee shall be in under the original instrument, without a new surrender to his use. (*Beal v. Shepherd*, Cro. Jac. 199; *Holder v. Preston*, 2 Wils. 200.)

As to copyholds in fee.—With respect to copyholds in fee, though a surrender is indispensable, still the lord is a mere conduit-pipe for that purpose: no interest passes to or remains in him; and the surrenderee, when admitted, is in by the surrender, and not by the lord; and the power of alienation in the copyholder is now so well established, that the lord is compellable, not only by subpoena in equity (*Williams v. Lonsdale*, 3 Ves. 752; and see *Roe v. Griffiths*, 4 Bur. 1961; *Vaughan dem. Atkins v. Atkins*, 5 Bur. 2787; *Towell v. Cornish*, 2 Keb. 357; *Moor v. Huntington*, Nels. C. R. 12; *Lunsford v. Popham*, Toth. 64; *Newby v. Chamberlain*, ib. 65; *March v. Gage*, ib.; *Derby v. Wainwright*, cited Hardr.

160), but by *mandamus* at law, to admit the person nominated by the former tenant. (*Rex v. Hendon (Lord of the Manor of)*, 2 T. R. 484; *Rex v. Coggan*, 6 East, 431; Wat. Cop. 51—93; *Rex v. Stafford (Marquis of)*, 7 East, 521; *Rex v. Water Eaton (Lord and Steward of)*, 2 Smith, 54; *Rex v. Wilson*, 10 B. & C. 80; *Rex v. Boughey*, 1 B. & C. 565; S. C. *Rex v. Meer (Lord of the Manor of)*, 2 Dow. & Ry. 824.) And this, whether the surrender be made of a portion only, or of the entirety of the premises (*Snag v. Fox*, Palm. 342; *Freeman v. Phillips*, 4 M. & Selw. 486), or of the whole or a portion of the copyholder's interest therein. (*Fitch v. Hockley*, Cro. Eliz. 441; Scriv. Cop. 623.)

Operation of surrender.—A surrender is defined to be the yielding up of an estate by the tenant to the lord, either as a relinquishment or resignation of such estate, or as the means of conveying it to another. It may be made in court, or into the hands of the lord, or his steward, or his deputy-steward, out of court, without a special custom to do so. (*Dudfield & Andrews*, 1 Salk. 184; *Lord Dacre's case*, 1 Leon. 289; *Parker v. Kett*, 1 Salk. 95; *Tukeley v. Hawkins*, 1 Lord Raym. 76; *Burgesse & Foster*, 1 Leon. 289; *Burdet's case*, Cro. Eliz. 48.) By special custom, but not otherwise, a copyholder may surrender out of court to the bailiff, beadle, or reeve of the manor. (Wat. Cop. 77.) By special custom, also, the surrender may be made into the hands of two tenants of the manor (Co. Litt. 59, a), or of one tenant (*Kitch. 1026*), or into the hands of the bailiff in the presence

of two tenants, or into the hands of a tenant in the presence of other persons (Co. Litt. 59, and Kitch. 201; *Turner v. Bessy*, 1 Mod. 61). And notwithstanding a doubt has existed in practice, it is now clearly settled that a copyholder may surrender by a power of attorney, as well as in person; for all such acts as a copyholder can do himself, he may authorize another to do for him, either in or out of court, and without any special custom for it. (*Combes's case*, 9 Co. 75, b; *Parker v. Keck*, Com. 85; *Warner v. Hargreave*, 2 Roll. Rep. 393; 1 Wat. Cop. 77; Scriv. Cop. 154.) But though a surrender by attorney is valid, a purchaser has still a right to insist on the surrender being made by the vendor in person, as a surrender by attorney tends to multiply his proofs; for the letter of attorney may possibly be revoked, or it may be lost, and thus expose him to difficulties. (*Mitchel v. Neale*, 2 Ves. senr. 679; *Noel v. Weston*, 6 Mod. 50.) But where it is necessary to allege a special custom to enable a copyholder to surrender in person, there he cannot surrender by attorney; as to surrender into the hands of two tenants (Co. Litt. 59, a), or into the hands of the bailiff or reeve of the manor (*Ib.*); for in these cases a special custom would be necessary to warrant the surrender of the copyholder himself, and therefore a surrender by attorney would not be good without a further custom for doing so. (Wat. Cop. 68.) Neither can a person having a bare authority to sell land, as an executor, for example, surrender by attorney. (*Combes's case*, 9 Co. 75.) The person who appoints the attorney must, in point of fact, have such a power

to assign as may be so executed, for *delegatus non potest delegare*. The person appointing the attorney, also, must not be under any disability; for a person *non compos*, under coverture, or an infant, cannot make an attorney by the common law, nor can they be enabled by custom; and the statute of 9 Geo. 1, it must be remembered, only enables *femes coverts* and infants to make attorneys for the purpose of admission. It has nothing to do with surrenders. (Wat. Cop. 66, f.) But a *feme covert*, or an infant, may be an attorney for another, the act being merely ministerial. (Co. Litt. 52, a.) The attorney must be appointed by deed (Gilb. Ten. 252), and he must pursue his authority strictly, and consistently with the customs of the manor; still, if he exceed his authority, the surrender will not be void *in toto*, but only as to the excess. (*George dem. Thornbury v. Jew*, Amb. 627.) An attorney may surrender either in the name of his principal, or in his own name (*Parker v. Kett*, 1 Salk. 96), but in the latter case the power should be referred to. It is no objection to the attorney's acting that the principal himself is also present. (Scriv. Cop. 157.)

Presentment.—When the surrender is complete, the next step is the presentment of such surrender, which, if it be taken out of court, should, according to the general custom of manors, be made at the succeeding court day (Co. Cop. s. 3; Tr. 88; Co. Litt. s. 79; Gilb. Ten. 220, 280; Scriv. Cop. 277; *Burgaine v. Spurling*, Cro. Car. 273, 283; *Burton v. Lloyd*, 3 P. Wms. 285, a; *Fawcett v. Lowther*, 2 Ves. 300; *Moore v. Moore*, ib. 596; *Mit-*

chel v. Neale, ib. 679); though, by special custom, it may be made at a subsequent one. (*Moore v. Moore*, 2 Ves. 602.) In *Horlock v. Priestley*, indeed (2 Sim. 77), the Vice-Chancellor expressed an opinion that, even in the absence of any special custom, a surrenderee has an inchoate legal title capable of being made complete whenever it may suit his convenience to have the surrender presented. The correctness of this *dictum* seems questionable, and in a case decided about the same time in the King's Bench, in which a question of this kind was mooted (*Doe v. Callaway*, 6 B. & C. 492; 9 Dow. & Ry. 518), Lord Tenterden, although, he said, it was not necessary, in the case before him, to give an opinion whether such a custom was good in point of law, yet he must say he should have great difficulty in holding that such a custom was good in point of law. And even where such a custom can be supported, no time should be lost in getting such presentment made; for if a subsequent surrenderee should make a prior presentment, he would exclude the former surrenderee, even though both presentments should be made at the same court. (*Burgaine v. Spurling*, Cro. Car. 273, 283; S. C. Sir W. Jones, 306.) It is also essential that the presentment should correspond in all material points with the surrender, as any variance between them might be fatal. (Scriv. Cop. 279; Wat. Cop. 88.) It must also be ascertained that the presentments have been duly made and entered on the rolls. This is a matter of the utmost importance; for although some contend that presentment is only for the information of the lord, to apprise him

that a surrender has been made, and therefore that it is not essential when the lord has obtained that information *aliundè*, there are others who argue just as strongly that a presentment, in every instance, is of as much importance as a surrender or admittance; that it is an integral part of the copyhold assurance, the tenant holding by copy of court roll, and presentment being an essential part of that roll,—and, in short, that the want of a true presentment will be a fatal defect in the surrender and admittance. (See Mr. Coventry's note to Wat. Cop. 80; Scriv. Cop. 279 *et seq.*) If, however, the presentment be truly made and accord with the surrender, and yet be wrongly entered on the rolls, the rolls may be amended. As for example, if a surrender be made upon condition and so presented, and the steward in presenting it omit the condition, enrolling it as an absolute one, yet, upon sufficient proof made in court, the surrender shall not be avoided, but the roll, being no estoppel nor record (*Burgesse and Foster's case*, 1 Leon. 289; 4 ib. 215), shall be amended; and this shall be no conclusion to the party to plead or give in evidence the truth of the matters. (*Winter and Jerningham*, Dy. 251, b; Gilb. Ten. 192; Co. Cop. s. 40, p. 89.) And though the admission was absolute, yet the surrenderee shall be subject to the condition; for when admitted, he shall be in by the surrenderor, and the lord cannot vary his estate. (4 Co. 28, b; Wat. Cop. 90.) So where a covenant to settle copyhold lands on the *heirs male* was entered on the rolls to the heirs general, the surrender was decreed to be vacated, and a new surrender directed

according to the covenant. (*Brend v. Brend*, Finch, 254.) In another case (*Hill v. Wiggett*, 2 Vern. 547), an entry in the steward's book, accompanied with corresponding parol proof by the foreman of the jury, was admitted as good evidence that a *feme covert* had surrendered the entirety of her estate, though the surrender on the roll and the admission was only of a moiety. And it has also been held, that a mistake by a steward in a surrender is only matter of fact; hence the courts of law will admit an averment of such mistake, either as to the land or uses. (*Towers v. Moor*, 2 Vern. 98.) And although parol evidence will not be admitted to supply the defect in a copyhold surrender, yet in a case of fraud and imposition the defendant will be allowed to read parol evidence in order to prove it, and oral testimony may be adduced to rebut an equity set up by the plaintiff, notwithstanding the Statute of Frauds. (*Walker v. Walker*, 2 Atk. 98; and see also Coventry's note to Wat. Cop. 90.)

Surrender only passes such an interest as the copyholder has.—A surrender will pass no greater estate or interest than the copyholder himself takes in the premises. Hence, if A, a copyholder for life, surrender to B, for the life of B it will only give the latter an estate for the life of A (Co. Cop. s. 34; Tr. 76; Wat. Cop. 98; Gilb. Ten. 257); for a surrender will pass no more than what the person making it may lawfully pass, and is not permitted to operate tortiously; therefore a surrender by the husband will be no discontinuance of the wife's copyhold lands. (4 Leon. 88, ca. 186; 4 Co. 23, a; and see *Oldcott v. Lovell*, Moore,

753; *Knight v. Footman*, 1 Leon. 95; Gilb. Ten. 189; *Shaw v. Thompson*, Cro. Eliz. 361.)

Evidence of surrender.—The court rolls afford the best evidence of surrender and presentment, but they are not the only evidence, as these acts may be proved by draughts of an entry produced from the muniments of a manor, and the parol testimony of the foreman of the homage who made such presentment. (*Doe dem. Priestley v. Calloway*, 6 B. & C. 848.) Nor is an entry on the rolls in all cases conclusive on the parties, as a mistake in the entry may be shewn by averment in pleading, or by evidence before a jury. (*Ib.*; and see also *Burgesse and Foster's case*, 1 Leon. 289; S.C. 4 ib. 214; *Kite v. Quenton*, 4 Co. 25.)

Of the interest of the surrender prior to admittance.—A surrenderee, prior to his admittance, takes merely as a nominee or appointee, so that before admission he may be said to have neither a *jus in re*, nor yet *ad rem*; he cannot enter without consent (*Berry v. Greene*, Cro. Eliz. 349), nor maintain trespass (Wat. Cop. 101); and having, therefore, no estate in the premises, he has nothing to forfeit until admitted to them (*Roe dem. Jefferys v. Hicks*, 2 Wils. 13); neither has he any thing to convey, so that he is incapable of surrendering to the use of another. (*Rawlinson v. Green*, Poph. 127; S. C. 3 Bulstr. 237; *Wilson v. Weddell*, 1 Brownl. 143; *Doe dem. Tofield v. Tofield*, 11 East, 246; *Robinson v. Grewes*, Bridg. 81; *Ford v. Hoskins*, Cro. Jac. 368; see also *Butler and Baker*, 3 Co. 39.) Still, for all this, he has such an equitable interest as was capable of assignment

(Wat. Cop. 101), and the lord may be compelled to admit accordingly. (*Rex v. Hendon (Lord of the Manor of)*, 2 T. R. 484; *Roe v. Griffiths*, 4 Bur. 1952; S. C. 1 W. Black. 605; *Holdfast v. Clapham*, 1 T. R. 601; *Doe v. Hall*, 16 East, 208.)

Admission.—Admission is said by some to be the formal, and the surrender the substantial part of the copyhold assurance. (*Benson v. Scott*, 4 Mod. 251; S. C. Salk. 185; Carth. 275; Skin. 406; see also Gilb. Ten. 438, n. 94; Scriv. Cop. 349.) By others it is said to be the life and perfection of the copyholder's estate, and to be to the surrender what livery of seisin is to the feoffment, which is more of essence than of form. It is, however, agreed on all sides, that admission confers no right, but merely gives the party having a title to the possession the means of obtaining it. (See Mr. Coventry's note to Wat. Cop. 230.) Still the admission has reference to the surrender, so as to defeat all mesne acts, as well of the surrenderor as of the lord of the manor (*Benson v. Scott*, sup.; *Grantham v. Copley*, 2 Saund. 422; *Holdfast dem. Woollams v. Clapham*, 1 T. R. 600; *Doe dem. Bennington v. Hall*, 16 East, 208); but until admittance the surrenderee is a mere stranger (*Payne v. Baker*, Orl. Bridge. 33), and is therefore incapable of surrendering (Co. Cop. s. 56; Tr. 130; Scriv. Cop. 170, 360); but where a surrenderee dies before admittance, though he has in a strict sense no legal right to the tenement, he has still a *scintilla juris* in a larger sense upon a contingency; i. e. if the presentment be duly made, he has a right to compel the lord, by a suit in Chancery, to admit him,

which right descends upon his heir. (*Payne v. Baker*, sup.) A devisee has no estate until admittance; and if not admitted, his devisee will have no title whatever,—either at law, for the admittance of such unadmitted devisee has no relation back to the last legal surrender (*Smith v. Inggs*, 1 Str. 487; *Doe v. Vernon*, 7 East, 8); or in equity, for this is not a case in which a court of equity would have supplied a surrender, and such unadmitted devisee having no equity in himself, he consequently could not convey any to his devisee. (*Wainwright v. Ethwell*, 6 Mod. 637.) It is apprehended, however, that in such a case the heir of the first devisee might claim to be admitted, though the lord could not compel him. (Scriv. Cop. 361, a.) And now as to devises of copyholds. Since the new Will Act came into operation (1 Vict. c. 26), it is expressly enacted “that the power thereby given shall extend to all real estate of the nature of customary freehold, or tenant right, or customary, or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, &c.” (Sec. 3.) Independently even of this statute, an unadmitted purchaser might have devised before admittance. (*Lady Foljambe’s case*, 1 Ch. Cas. 39.) In a case of this kind, the heir-at-law, and not the devisee, will be the proper person to be admitted, because a court of law cannot recognise the interest of the devisee at the same time that it denies any power in the devisor to devise; but then the heir will be a

trustee for the devisee. By this means two fines will be incurred before the devisee can acquire the legal estate, and perhaps a third, if the lord be entitled to a death fine. (See also Cov. note to Wat. Cop. 125.) The admittance of a tenant for life or years is at the same time an admittance of all in remainder (*Buller v. Lightfoot*, 3 Leon. 239; 4 ib. 9; *Heggor v. Felston*, 4 Leon. 111; *Gyp-pyn v. Bunney*, Cro. Eliz. 504; S. C. by the name of *Tipping v. Bunning*, Mo. 465; *Colchin v. Colchin*, Cro. Eliz. 662; *Auncelme v. Auncelme*, Cro. Jac. 31; *Bullen v. Grant*, Cro. Eliz. 148; *Brown's case*, 4 Co. 226; *Fitch's case*, ib. 23, a; *Jurden v. Stone*, Hutt. 18; *Warsopp v. Abell*, 5 Mod. 306; *Blackborn*, or *Batmore*, or *Blackborough v. Greaves*, 1 Mod. 102; S. C. 3 Keble, 263; 1 Ventr. 260; 2 Lev. 107; *Barnes v. Corke*, 3 Lev. 308; *Bath (Earl of) v. Abney*, 1 Bur. 206; S. C. Cow. 713; *Doe dem. Whitbread v. Jenney*, 5 East, 522; 7 ib. 22; *Reid v. Shergold*, 10 Ves. 380; *Church v. Munday*, 12 Ves. 426, 431; *Kensington (Lord) v. Mansell*, 13 ib. 246, 253); the whole limitations forming together but one estate, and therefore one fine only can be due unless by special custom. (Scriv. Cop. 405.) The admission of one joint tenant is also the admission of them all; joint tenants being seised *per mie et per tout*, so that if one die, or release or surrender to his companions, no new admittance is necessary (Co. Cop. s. 35; Tr. 82; *ib.* s. 56; Tr. 130; Co. Litt. 193, a; 318, a; *ib.* ss. 286, 288; *Wase v. Pretty*, Winch. 3; *Mortimore's case*, Hetl. 150; Gilb. Ten. 286, 330; *Doe dem. Aston*

v. Hutton, 2 Wils. 192); for they form altogether but one tenant to the lord; consequently, one fine only is due on their admission, or on the admission of their surrenderee. (Scriv. Cop. 363, 411.) The like observations are also applicable to coparceners, who, however numerous they may be, form altogether but one heir, and therefore one admission, one fine, and one set of fees will suffice for them all. (Litt. ss. 241, 313; *Morrice v. Prince*, Cro. Car. 251; Gilb. Ten. 174; Wat. Cop. 277.) It seems also that, like joint tenants, they may release to each other, and that no further admission of them will be requisite. (Co. Litt. 96; Gilb. Ten. 73; Scriv. Cop. 364.) Coparceners, indeed, may be, and in fact often are, admitted severally,—a practice introduced by stewards in order to multiply their fees. This will not, however, affect the fine, as that will be apportioned amongst them; but the fees will be increased in proportion to the number admitted. (*Ib.*) Tenants in common, as they take several and distinct estates, must be severally admitted, and must also pay several fines (*Hobart v. Hammond*, 4 Co. 28, a); and if one tenant in common die, or surrender to another, the surrenderee or the heir must be regularly admitted, and pay the fine accordingly. (Co. Cop. s. 56; Tr. 130; *Fisher v. Wigg*, 1 P. Wms. 21; S. C. Salk. 391; Wat. Cop. 280; Scriv. Cop. 364, 365; *Attree v. Scott*, 6 East, 484.) But if several undivided shares of a copyhold become reunited in one person, as where several tenants in common concur in the surrender to one person (Co. Cop. 56; Tr. 130; Kitch. 242; Scriv. Cop. 412), they again form one entire and

undivided estate. (*Garland v. Jekyll*, 2 Bing. 303 ; *Holloway v. Berkeley*, 6 B. & C. 14 ; overruling Lord Ellenborough's decision in *Attree v. Scott*, 6 East, 476.)

Executors and administrators.—Executors and administrators of a copyholder must be admitted, and pay a fine thereupon. (*Gravenor v. Ted*, 4 Co. 23, a ; *Batmore v. Graves*, 1 Mod. 102, 120 ; Scriv. Cop. 368, 413.)

Commissioners and assignees of bankrupts.—Previously to the statute 6 Geo. 4, c. 16, copyholds were included in the bargain and sale from the commissioners to the assignees of a bankrupt ; the consequence of which was, that it became necessary for the assignees to be admitted, whereby a double fine was incurred, — one on the admission of the assignees, another on that of the purchaser. In order to prevent this consequence, it became the practice for the commissioners to except the copyholds out of the bargain and sale of the bankrupt's estate to the assignees, and to convey them at once to the purchaser, by which means one fine only was incurred. (*Drury v. Mann*, 1 Atk. 96 ; *Ex parte Holland, re Harvey*, 4 Mad. 483 ; Scriv. Cop. 369, 370.) The statute 6 Geo. 4, c. 16, s. 68, however, empowers the commissioners, by deed indented and enrolled, to dispose of the bankrupt's copyhold lands, and to authorize any person on their behalf to surrender the same to the purchaser ; so that the bargain and sale of the commissioners under this Act conferred the beneficial interest only to the purchaser ; and as he did not require the legal estate until he was admitted upon the surrender of the

person so authorized to make it, no fine became payable out of the bankrupt's estate. (Scriv. Cop. 415.) Nor is the law altered in this respect by the more recent enactment of the 1 & 2 Wm. 4, c. 56, as the 26th section of that Act, which vests the real estate of the bankrupt in his assignees, does not apply to copyhold property, but is confined to such real estate as by the Act of 6 Geo. 4 was directed to be conveyed by the commissioners to the assignees, namely, the bankrupt's freehold property; so that the powers conferred by the 6 Geo. 4 still remain in force with respect to the sale of copyholds, and may be exercised by any one of the commissioners of the Court of Bankruptcy, or by the commissioners named in the fiat. (Scriv. Cop. 372.)

Assignees of insolvents.—A great difference of opinion seems to have existed amongst the profession, as to whether it was necessary that the provisional or general assignee of an insolvent debtor should have been admitted to the premises in order to confer a title to copyholds through an insolvent debtor (see stats. 53 Geo. 3, c. 102; 54 Geo. 3, c. 28; 1 Geo. 4, c. 119; 7 Geo. 4, c. 57; 5 Wm. 4, c. 38); but it appears that it is not necessary that either should be admitted. A conveyance executed in pursuance of the 11th section of the statute 7 Geo. 4, would, prior to the recent stat. 1 & 2 Wm. 4, c. 110, have had the effect of vesting the copyhold estates of the copyholder in the provisional assignee; but that interest was divested and transferred to the general assignee, by the conveyance and assignment under the 19th section of the 7 Geo. 4, and the

7th section of the 1 Wm. 4. (Scriv. Cop. 375.) Nor, it seems, will it be necessary that either the provisional or general assignee should be admitted under the more recent enactment of 1 & 2 Vict. c. 110. The 37th section of that statute vests all the insolvent's real and personal estate in the provisional assignee, by order of the Court, without any conveyance or assignment, which by the 45th section will become transmissible to the general assignees appointed by the Court by virtue of such appointment, and vest in them without any conveyance or assignment. (Sec. 45.) And in case such prisoner shall be entitled to any copyhold or customary estates, a certified copy of such vested order as aforesaid, and a certified copy of the appointment of such assignee or assignees as aforesaid, shall be entered on the court rolls of the manor of which such copyhold or customary estate shall be holden; and thereupon it shall be lawful for such assignee or assignees to surrender or convey such copyhold or customary estate to any purchaser or purchasers of the same from such assignee or assignees as the Court shall direct. (Sec. 47.)

Who may admit.—In the case of descents and surrenders, the lord, the steward, or under-steward are merely instruments: they are compelled to admit, if ostensibly such, and the tenant is not bound to inquire into the legality of their title. (Co. Litt. 58, b; 1 Co. 140, b; Wat. Cop. 254.) The lord may, if he pleases, admit by attorney, but he cannot be compelled so to do (*Combes's case*, 9 Co. 766; *Floyer v. Hedgingham*, 2 Cha. Rep. 56),

except in the case of *femes coverts* and infants taking by descent or surrender to a last will, whom, under an Act of Parliament, 9 Geo. 4, c. 29, he is now compellible to admit by attorney in certain cases. (Wat. Cop. 258.)

Customary form should be strictly adhered to.—

The customary form of admittance should be strictly pursued, as any deviation would probably be fatal at law, though equity would doubtless relieve if there was a sufficient *bond fide* consideration to call for its interposition. (Scriv. Cop. 351; Foul. Eq. 38, lib. 1, c. 1, s. 7; *Smith v. Smith*, 1 Cha. Rep. 57; *Bradley v. Bradley*, 2 Vern. 163; *Jenning v. Moore*, ib. 609; *Anon.* 2 Freem. 65; *Taylor v. Wheeler*, 2 Vern. 564; *Barker v. Hill*, 2 Cha. Rep. 113.)

Fine.—Upon the purchaser being admitted, his title is perfected; and then, but not until then, the fine of admission becomes payable (*Rex v. The Lord of the Manor of Hendon*, 2 T. R. 484); and this, and also the steward's fees, are to be paid by the purchaser; so that if, as I have already remarked, the vendor were to covenant to surrender the premises at his own cost, it would be no breach that he refuses to pay the fine, the title of the purchaser being perfected by the admittance (*Drury v. Mann*, 1 Atk. 95; Scriv. Cop. 384; *Graham v. Sime*, 1 East, 634), and the fine not payable until afterwards.

Of the declaration of uses.—In treating on the subject of the declaration of the uses of a surrender, I purpose to consider it: 1st, With respect to the person in whose favour the surrender is made.

2ndly, With respect to the property intended to pass by it: and, 3rdly, With respect to the limitation of estates by such surrender.

1. *As to the person.*—It is necessary, says Sir E. Coke (Co. Cop. 35, Tr. 80), that upon surrenders of copyholds the name of the party to whose use the surrender is made be precisely set down; but if by any manner of circumstance the grantee may be certainly known, it is sufficient; and therefore a surrender made to the Lord Archbishop of Canterbury, or to the Lord Mayor of London, or to the High Sheriff of Norfolk, without mentioning either the Christian or surname, is good and certain enough, because they are certainly known by this name without further addition. So if I surrender to the use of the next of my blood, or to the use of my wife, or to the use of my brother or sister (having but one brother or sister), these surrenders are good without any additions, because the grantee may be certainly known by the words. (Wat. Cop. 107.) So if I surrender to the use of my son W. having more sons than one by that name, yet by averment this uncertainty may be helped. (*Ib.*; see also *Doe ex dem. Huckall v. Foster*, 9 East, 405.) But if I surrender to the use of my cousin or my friend, this is so general and so uncertain, that no subsequent manifestation of my intention can in any way strengthen it. (Wat. Cop. 108.) So if three persons surrender to the use of three or four of St. Dunstan's parish, not naming the parishioners by their names, this surrender is utterly void; as it also will be if I surrender in the disjunctive to the use of J. L. or J. N. and thus be

insufficient for the uncertainty. (Co. Cop. 35; Tr. 80, 82; Wat. Cop. 108; Scriv. Cop. 180, 181.) Questions have sometimes arisen as to whether a person who was named only in the *habendum* should take under a surrender of copyholds; and it has been said that he shall not take unless it be by a particular custom authorizing such grant (*Westmore v. Hob*, 313); but this is certainly not the law of the present day, nor can it be supported by the principles upon which the rule respecting the operation of surrender of copyholds is governed. The surrender itself, as an eminent modern writer upon this subject observes (Scriv. Cop. 213), "merely points out the person whom the lord is to admit, and the estate intended to be transferred to him by the surrenderor; the lord then grants the seisin to the surrenderor without any words of limitation, to hold to the surrenderee *and his heirs*, or for such other interest as is expressed in the surrender; and if the surrender does not distinctly describe either the person of the surrenderor, the estate, or the estate intended to be transferred to him, this may be explained by the act of admittance or grant." (*Brooks v. Brooks*, Cro. Jac. 434; *Fisher v. Wigg*, 1 Lord Raym. 624; see also Gilb. Ten. 255, 259.) And even at common law a person may take by way of remainder, though he be not named in the premises with him to whom the estate is first limited. (*Greenwood v. Tyder*, Cro. Jac. 563; Wat. Cop. 114, 115; Scriv. Cop. 214; 2 Roll. Abr. 67, pl. 11; Gilb. Ten. 259.) But an estate cannot arise by implication upon a surrender of copyhold property, any more

than in a deed at common law. (*Allen v. Nash*, 1 Broul. 127; *Seagood v. Hone*, Cro. Car. 366; S. C. W. Jones, 342; Gilb. Ten. 259; Wat. Cop. 215.)

2. *As to the property surrendered.*—Where the surrendered premises are sufficiently described, as by giving a close a particular name, a subsequent mistake, either as to the name of the tenant or the number of acres, will not injure the grant or surrender. Hence where a copyholder surrendered all his copyhold cottage with the croft adjoining, &c. *all which premises he stated were then in his own possession*, when in point of fact the surrenderor only held the cottage and garden behind it, it was nevertheless held that the croft passed; the description of the premises as being in the possession of the surrenderor being a mere mistake, and the words in the surrender being sufficient to comprise them. (*Goodright and Lamb v. Pears*, 11 East, 58; see also Shep. Touch. 99; *Goodtitle dem. Paul v. Paul*, 2 Bur. 1089; S. C. W. Black, 255; *Doe v. Greathead*, 8 East, 103.)

3. *As to the limitation of estates under the surrender.*—Surrenders of copyhold estates are said to be governed by the same rules of construction as conveyances of freehold estates. (*Idle v. Cook*, 1 Salk. 620; *Fisher v. Nicholls*, 3 ib. 100; S. C. Holt, 163; S. C. 2 Lord Raym. 1144; *Fisher v. Wigg*, 1 Lord Raym. 630; S. C. 1 P. Wms. 14; 12 Mod. 296; 1 Salk. 391; 3 ib. 206; *Stone v. Stone*, 2 Atk. 101; *Lovell v. Lovell*, 3 Atk. 11; *Allen v. Patshall*, Godb. 137; *Seawood v. Hone*, Cro. Car. 366; *Pawsey v. Lowdall*, Sty. 250;

Wright dem. Burrill v. Kempe, 3 T. R. 473; *Glib. Ten.* 268; *Rigden v. Valier*, 3 Atk. 731.) It is true copyholds, not being within the Statute of Uses, that statute cannot execute the legal estate in the surrenderee, for until admittance the estate remains in the surrenderor; still upon admittance the surrenderee will become clothed with the legal estate, in the same manner as it would have vested in *cestui que use* in freehold estates under the statute, and will relate back to the time of the surrender, and operate from its date. (*Benson v. Scott*, 1 Salk. 185; *S. C. Carth.* 276; 3 *Lev.* 385; *Payne v. Barker*, Orl. Bridg. 24; *Vaughan dem. Atkins v. Atkins*, 5 Burr. 2785; *Grantham v. Copley*, 2 Saund. 422; *Holdfast dem. Woollams v. Clapham*, 1 T. R. 600; *Doe dem. Bennington v. Hall*, 16 East, 208.) The same limitations also, which in the case of a conveyance or devise of freeholds, would create an estate tail under the rule in *Shelley's* case, will create a similar estate when contained in a surrender or a devise of copyholds. And upon the same principle a surrender, and previously to the late Will Act, 1 Vict. c. 26, a devise to one of copyholds, without words of limitation, would have passed a life estate only. (*Co. Cop.* 59, b; *Ib.* 41; *Tr.* 93.) But notwithstanding that, generally speaking, the same words are necessary to create certain estates of copyholds as are requisite to the creation of the same estates in freeholds, yet, by force of a particular custom, they may be otherwise created; thus, by special custom, an estate of inheritance may be created by the words *sibi et suis*, or *sibi et assignatis*, or the like. (*Bunting v.*

Leapingwell, 4 Co. 29, b.) So, in some manors, the words "*sequels in right*" are used instead of the technical word "heirs," and in others in addition to it; as to A, his heirs and sequels in right. (Wat. Cop. 109; Scriv. Cop. 179.) A remainder of copyholds would not, however, have failed of effect for want of a preceding particular estate to support it (*Mildmay v. Hungerford*, 2 Vern. 243; *Lovell v. Lovell*, 3 Atk. 12; *Habergham v. Vincent*, 2 Ves. 209; *Stansfeld v. Habergham*, 10 Ves. 282; *Doe v. Martin*, 4 T. R. 64; *Roe dem. Clemett v. Briggs*, 16 East, 406); and therefore in settlements of copyhold estate it was the common practice to omit the limitation to trustees to support contingent remainders. (Scriv. Cop. 476; Wat. Cop. 197.) It has, however, been suggested, that as the lord, in case of a forfeiture by a tenant for life, is entitled to the land for his own use during such particular estate (*Lane v. Pannel*, 1 Roll. Rep. 238, 317, 438; *Habergham v. Vincent*, 2 Ves. 214; S. C. 4 Bro. C. C. 364), a limitation to preserve contingent remainders should be inserted in settlements of copyhold as well as of freehold estates. (Atherley's Mar. Set. 570; Wat. Cop. 197.) There can be no doubt, certainly, as to the prudence of adopting such a course, if the lord would consent to accept a surrender so framed; but it seems that he could not be compelled to accept a surrender which would be calculated to defeat his right of entry for an act of forfeiture incurred by the tenant for life. (See Mr. Coventry's note to Wat. Cop. 197; Scriv. Cop. 480.) With respect to assurances made subsequently to the 8 & 9 Vict. c. 106, it has

been already observed that trustees, to preserve contingent remainders, are no longer necessary, even in settlements of freehold property (see *antè*, vol. i. p. 315); but this statute, it must be observed, is only prospective in its operation. (*Ib.*)

Whether an estate in copyholds can be limited to commence in futuro.—A surrender of copyholds being construed as a deed at common law, and not as a will, it follows that an estate can no more be created to commence *in futuro* by surrender, than it could by a common-law assurance. (Wat. Cop. 198; *Clampe's case*, 4 Leon. 8; *Seagood v. Hone*, Cro. Car. 366; *Allen v. Nash*, Noy. 152; *Dunnal v. Giles*, Brownl. 41; *Simpson's case*, Godb. 264; S. C. Cro. Jac. 376, by name of *Sympton v. Southern*; S. C. 1 Roll. Rep. 109, 137, 253; and 2 Roll. Abr. 791, 794, by name of *Simpson v. Southwood*; see also Gilb. Ten. 260; *Barker v. Taylor*, Godb. 451; *Bambridge v. Whitton*, March, 177; see also Scriv. Cop. 200.)

Fee upon a fee.—Whether a fee can be limited on a fee of copyholds by surrender, is a point of less certainty, and the authorities on the subject are many of them irreconcilable with each other; whilst the opinions of learned lawyers are no less at variance than the cases. Mr. Coventry, however, in a note to his edition of Walker's Copyhold, p. 210, n. 1, gives the clearest view of the law on this subject, in which, after stating that he had inspected the numerous cases on this head in the reports themselves, he had arrived at the following conclusions:—

1st. That an immediate surrender of copyholds cannot be maintained.

2ndly. That a fee may be limited on a fee in a surrender of copyholds, by way of condition, but not by way of springing, shifting, or secondary use. (*Edwards v. Hammond*, 3 Lev. 132.)

3rdly. That a surrender may contain a power of appointment or nomination, but not a power that will defeat uses once vested. (*Beal v. Shepherd*, Cro. Jac. 199; *Driver v. Thompson*, 4 Taunt. 294; and see Belt.'s Supp. to Ves. 323.)

The same learned writer also remarks that "a condition cannot be made the means of limiting a fee upon a fee in the same manner, and to the same extent, as a limitation of uses in a statutable conveyance of freehold; neither can such power of nomination or appointment be made the medium of springing or secondary uses on freeholds, since the statute. (See Scriv. Cop. 226.) The cases in support of the doctrine that a surrender may be made *in futuro*, are, for the most part, cases on wills, where, by means of executory devises, such uses are admissible; and it appears never to have been doubted that the equitable ownership of copyholds is susceptible of shifting uses in the same manner as freeholds; and if there have been many instances of surrenders to future and springing uses engrafted on the legal estate of copyholds in any particular manor, it is highly probable that a court of equity would consider such uses as sanctioned by custom, and assist in establishing rather than overturning them on the doctrine in question."

In conclusion, however, he observes, that a title

depending on a question of this kind, depends on a very doubtful question, and that therefore a purchaser is not bound to accept it.

Where no use is expressed.—It is said that if a copyholder surrenders into the hands of the lord without declaring any use, that it shall enure for the benefit of the lord, and the copyhold will become extinguished, as on a surrender by a tenant for life to him in reversion. (*Fisher v. Wigg*, 1 P. Wms. 17; Wat. Cop. 92.) But at the present day the Court of Chancery would doubtless catch at the slightest indication of the surrenderor's intention to preserve the estate from the consequences of this doctrine. (See Mr. Coventry's note to Wat. Cop. 92.)

Resulting trusts.—Where the surrender is made to one party, and another pays the purchase-money, the former will become a trustee for the latter, in like manner as in purchases of freehold property, where the person taking the legal estate will in equity be decreed to be a trustee for him who advances the purchase-money. (As to which see *antè*, vol. i. pp. 193, 197; see also *Dyer v. Dyer*, 2 Cox, 92; *Zinzon v. Zinzon*, T. Jones, 142.) In like manner, if copyholds are granted for two or three lives in succession, and one only pays the fine, the others are trustees for him. (*Benger v. Drew*, 1 P. Wms. 780; *Rundle v. Rundle*, 2 Vern. 264; *Withers v. Withers*, Amb. 151; *Rumbold v. Rumbold*, 2 Eden, 15.) And this notwithstanding that the custom of the manor is that the lives shall take in succession. (*Smith v. Baker*, 1 Atk. 385; and see *Clarke v. Danvers*, 1 Cha. Cas. 210.) Still

for all this a custom that the nominees shall take for themselves, unless a trust to exclude them appear on the rolls, has been held to be a reasonable custom. (*Edwards v. Fidell*, 3 Mad. 237.) To prevent questions from arising on this subject, an express declaration, where the nominees are to take beneficially or in trust, should always be inserted in or accompany the surrender. (See also Coventry's note to Wat. Cop. 214.)

Tenant right of renewal.—In certain manors copyholds are held for lives (*Kempe v. Carter*, 1 Leon. 65); or years (*Page's case*, Cro. Jac. 671), with a perpetual right of renewal on payment of a fine certain. A custom to renew for lives can only be supported by immemorial usage, otherwise it will be at the option of the lord whether he will grant or not. (Co. Litt. 290, b.) Where such a custom does exist, the right of renewal sometimes extends to three lives or any less number, and sometimes for even more than three lives: as, for example, in the manor of Bleadon and Priddie, in Somersetshire, where the copyholds are granted for four lives successively, and the grantee in possession may surrender his own interest and also the reversionary interests. (*Prankerd v. Prankerd*, 1 Sim. & Stu. 1.) In other manors the right of renewal comprehends three lives in possession and three in reversion. And as a power to grant the greater power includes the less, under a custom to grant for three lives, a grant for two or one will be good. (*Down v. Hopkins*, Cro. Eliz. 323; *Ven v. Howell*, 1 Roll. Abr. 511; *Smartle v. Penhallow*, 1 Salk. 188; S.C. 3 ib. 181; 2 Lord Raym. 295; and see Scriv. Cop.

121.) It seems also, that in all manors in which a custom of tenant right of renewal prevails, the lord is bound to regrant for at least the residue of the life of the surrenderor; and in many manors the tenant has a right to name his successor, in which case the lord is bound to grant to such successor for the life of that person, as distinguished from the life of the surrenderor. Still a copyholder for life has no right, in the absence of a custom to that effect, to substitute any person in his place in the tenancy, as such a power might often prove highly prejudicial for the lord, by enabling a tenant in ill health, or even in the last stage of consumption or some other incurable malady, to introduce a healthy and robust life into the tenancy in his stead. (See Mr. Coventry's note to Wat. Cop. p. 51.) In order, also, to support the custom of tenant right to renewal, it must point out the person from time to time entitled to the benefit of it, otherwise it will be liable to be impeached for uncertainty. It must also be shewn that the fine is equally certain, or if not positively, at least relatively, certain, as a year or a year and a half's value at the time of the grant (*Titus v. Perkins*, Skin. 250); to allege such custom to be on payment of a *reasonable fine* will not be sufficient, as that implies uncertainty (*Grafton (Duke of) v. Horton*, 2 Bro. Parl. Cas. 284; *Wharton v. King*, 3 Anstr. 659; *Abergavenny (Lord) v. Thomas*, ib. 668, n. a); and if such custom be not found to renew on payment of a fine *certain*, the lord may insist upon his own terms. (Litt. lib. 1, c. 9, s. 73; 2 Black. Com. 79; Gilb. Ten. 239; 2 Woodes. Lec. 45; Wat. Cop. 311;

Scriv. Cop. 423.) *Freeman v. Phillipps* (4 Mau. & Selw. 486) may indeed at first seem opposed to this doctrine, but in reality it is not so; for there the fine was considered as relatively, although not positively certain, which is sufficient. (See Mr. Coventry's note to Wat. Cop. 374; and see Scriv. Cop. 426.)

Of conditional fees in copyholds.—It has already been stated that, in the absence of an express custom to entail copyholds, a limitation in terms which, if applied to freeholds, will create an estate tail, will confer merely a conditional fee in copyhold property. (See 3 Ed. 4, pl. 6; 4 Hen. 6, pl. 17; 41 Ed. 3, pl. 45; 45 Ed. 3, pl. 19.) Now, according to the legal idea of a conditional fee, it became alienable in fee-simple on issue born; and this power of alienation it was which was expressly restrained by the statute *de donis* (Stat. Westm. 2), but which statute, as it does not affect copyholds (*Heydon's case*, Sav. 67; *Rowden v. Maltser*, Cro. Car. 42), leaves the power of alienation of property of that kind in precisely the same situation as if that Act had never been passed. When, therefore, a limitation of copyholds is only regarded as conveying a conditional fee, the person to whom it is so limited may, on having issue, convey it away to a third party in fee-simple by a common surrender (*Rowden v. Maltser*, Cro. Car. 42); nor will this conveyance be affected by the subsequent failure of issue. And even if the surrender be made before issue had, yet, by analogy to the rule with respect to freeholds, it will be made good by relation, if issue be after-

wards born. But it will be otherwise if no issue should ever be born. These observations are, of course, only applicable to those cases where there is no custom to warrant an entail; for where any such custom exists, then an estate tail, and not a fee-simple conditional at common law, would be held to pass.

*Estate tail in copyholds, how formerly bar-
rable.*—Previously to the late Fine and Recovery Substitution Act (stat. 3 & 4 Wm. 4, c. 74), there were several modes of assurance by which a copyholder tenant in tail might have barred that estate, and the remainder thereon, and thus have acquired the fee; but the most general, the most solemn, and, according to Lord Macclesfield (*Dunn v. Green*, 3 P. Wms. 10), the most proper way, was by recovery in the lord's court on a plaint analogous to a recovery in the superior courts. (*Everall v. Smalley*, Str. 1179.) The fee thus acquired will descend in the same course as the estate tail would have descended; consequently, if the recoveror had taken the estate *ex parte materná*, the fee would have descended to his maternal heirs. (*Crow v. Baldwere*, 5 T. R. 104.) The recovery, when suffered, should have been entered on the court rolls. But proceedings in a court of this description are not canvassed with the same accuracy as judgments in the courts of Westminster Hall, and therefore a common recovery in a court baron has been supported, though erroneously, not merely on the ground of being a common assurance, but because it was suffered in a court baron. (*Ash v. Royle*, 2 Vern. 376; Show. Parl. Cas. 67.) Where the custom does not pre-

scribe any particular mode of barring the entail, a surrender (although only to the use of a will) will be sufficient for that purpose without a custom. (*Otway v. Hudson*, 2 Vern. 585; *Martin dem. Weston v. Mowlin*, 2 Burr. 980; *Car v. Singer*, 2 Ves. sen. 603; *Moore v. Moore*, ib. 596.) But a custom to bar by surrender may be concurrent with a custom to bar by recovery; for it is no more unreasonable to allow two ways of barring an entail of copyholds, by surrender and recovery, than it was to permit two modes of alienating an entail of a freehold by fine and recovery. (*Everall v. Smalley*, 1 Wils. 26; S. C. 2 Str. 1197; *Doe v. Truby*, 2 W. Black. 944; 2 Wms. Saund. 422, n. 1.) Another way by which an estate tail in copyholds might have been docked was by preconcerted forfeiture and regrant. This was effected by the tenant making a lease without license, or unwarranted by the custom, or doing some other act to incur a forfeiture, whereupon the lord would seize upon the copyhold for such forfeiture, and immediately regrant it to the person designated; the whole procedure being a mere form for effecting a bar, and the lord a mere instrument, and compellible to regrant at pleasure, as in the case of a common surrender. (*Grantham v. Copley*, 2 Saund. 422; *Saunderson v. Stanhop*, 2 Keb. 127; S. C. 1 Sid. 314; *Taylor v. Shaw*, Carth. 6, 22; Co. Cop. s. 48; Tr. 112; Wat. Cop. 174, 175; Scriv. Cop. 71, *et seq.*) But it seems that a forfeiture and regrant will not be an effectual bar, unless there is a custom to support it (*White v. Thornburgh*, 2 Vern. 705; *Pilkington v. Bagshaw*, Sty. 450;

Snow v. Cutler, 1 Keb. 567, 752, 800, 851; 1 Lev. 136; 1 Sid. 153; Sir T. Raym. 164; *Carr dem. Dagwei v. Singer*, 2 Ves. 604; *Martin dem. Weston v. Mowlin*, 2 Burr. 979); for where the custom is silent as to the mode of barring entails, the proper way of effecting it is by surrender. (Scriv. Cop. 75.) On this account, therefore, in modern practice, where there was a custom in the manor to bar entails, either by surrender or by recovery, a preference was usually given to the former. (*Everall v. Smalley*, Str. 1197; S. C. Willes, 26.) And a single instance of a surrender in fee by a tenant in tail, will be sufficient evidence to prove a custom to bar by surrender, if there are but few instances of bar by recovery. (*Roe v. Jeffery*, 2 M. & S. 92.) And by whatever mode of assurance the entail is barred, it will produce the same effect as a recovery suffered of freeholds. It will, in like manner, confirm prior charges, bar the remainders over, and enlarge the estate tail into a fee. (*Otway v. Hudson*, 2 Vern. 583.)

As to equitable estates.—Where the custom of a manor prescribes any particular mode of barring entails, that mode should be adopted in barring an equitable, as would be necessary to bar a legal estate tail. If, therefore, the custom be that the entail should be barred by recovery, a recovery should be suffered in the manor court of the equitable estate in the copyholds analogous to that relative to freehold property; and although an equitable tenant in tail of copyholds may have transferred his equitable interest to a mortgagee, he may, nevertheless, alone suffer an equitable recovery. (*Nouaille*

v. Greenwood, 1 Turn. 26.) In the absence of a custom to bar the entail by a recovery, an equitable estate, like a legal one, may be barred by a surrender only. (*Radford v. Wilson*, 3 Atk. 815.) And where an equitable entail may be so barred, it seems that a court of equity would deem a surrender of the fee-simple to the *cestui que trust* a sufficient bar to the entail. (*Grayme v. Grayme*, cited Wat. Cop. 180; *Otway v. Hudson*, 2 Vern. 583.) But where any other form of barring entails is prescribed by the custom, then it seems that the simple act of accepting a surrender of the legal estate by an equitable tenant in tail of copyholds will not, except under very particular circumstances and such as call for the aid of a court of equity, bar the entail. It must also be observed that the descent of the legal estate on an equitable tenant in tail will not operate as a merger, so as to bar an estate tail, even where there is a custom to bar it by surrender (*Merest v. James*, 6 Madd. 118); because, in order that an equitable may merge in the legal estate, they must be estates of the same quality, which an estate in fee and an estate tail are not. And the reason why accepting the legal fee by surrender will bar the equitable entail whilst a descent of the same estate will not, is that the acceptance of the legal fee by surrender will afford evidence of an intention to destroy an estate tail, and which a court of equity will consider as barred accordingly, but which intent cannot be inferred by the legal fee devolving by descent upon the person previously taking an equitable estate tail in the same premises. (See Mr. Coventry's note to 1 Wat. Cop. 179.)

The enfranchisement of a copyhold tenant in tail will have the effect of barring his estate tail in the copyhold premises. (*Dunn v. Green*, 3 P. Wms. 9; *Parker v. Turner*, 1 Vern. 393; *Challoner v. Marshall*, 2 Ves. 524; *Wynne v. Cookes*, 1 Bro. C. C. 515; *Phillips v. Bridges*, 3 Ves. 127.) A dormant entail may be presumed to have been cut off, where several of the issue of the tenant in tail have been admitted as heirs in fee-simple (*Wadsworth's case*, Clay, 26); or there has been that length of possession and a consistent deduction to the title of the fee-simple from which such presumption may be reasonably inferred. (*Roe v. Lowe*, 1 H. Bl. 459; Wat. Cop. 181; Scriv. Cop. 81.)

Fine levied in Common Pleas no operation on copyholds.—Some difference of opinion seems to have existed as to whether a fine or recovery of copyhold lands levied or suffered in the Common Pleas would be binding and effectual; but the better opinion seems to be that it would not, and that neither the legal nor the equitable interest would be affected by it; for that in either case a fine so levied would be *coram non judice*. (Scriv. Cop. 87; *Searle v. Kitner*, Chan. April 15th, 1809, cited 19 Ves. 335; *Scott v. Kettlewell*, 19 Ves. 335.)

Estates tail in copyholds now now barrable.—The statute 3 & 4 Wm. 4, c. 74, which abolishes fines and recoveries, and comprehends copyhold as well as freehold estates, prevents an estate tail from being now barred by a recovery in both descriptions of property. The clauses of that Act, however, as far as they relate to the barring of estates tail, apply equally to copyholds as to freeholds, except that

dispositions of copyholds under that Act of legal estates are to be by surrender, and of equitable estates either by surrender or by deed. (Sec. 50.) So where the consent of a protector is necessary to bar an estate tail in freeholds, it will be equally requisite to effect the same object in copyholds. If such protector consents by deed, the deed must be produced to the lord, or his steward, at or before the surrender, and the lord or steward is to acknowledge such production by indorsement on the deed, and enter the deed and indorsement on the rolls; and the indorsement is to be evidence of the production, and the lord or steward is to indorse on the deed a memorandum of such entry. (Sec. 51.) If the protector does not consent by deed, the consent is to be given to the person taking the surrender; and if the surrender be out of court, the consent is to be stated in the memorandum of the surrender, and the memorandum signed by the protector, and the lord or his steward to enter the memorandum on the rolls, and it is to be evidence of the consent and surrender; but if the surrender be in court, the lord or steward is to enter the consent on the rolls, with a statement of the consent, and such entry, *or a copy*, is to be evidence, as any other entry or copy. (Sec. 52.) An equitable tenant in tail of copyholds may dispose of them under the Act, or by deed to be entered on the rolls; and if the protector consent by a separate deed, it must be executed previously to, or simultaneously with, the disposition, and is to be entered on the rolls. Such entries are imperative on the lord, or his steward, who is to indorse on

the deeds a memorandum of them ; and the deed of disposition will be void against subsequent purchasers, unless it be so entered. (Sec. 53.) But in no case where any disposition of copyholds by a tenant in tail under this Act shall be effected by surrender, or by deed, shall the surrender, or a memorandum, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent to the disposition, require enrolment, otherwise than by entry on the court rolls. (Sec. 54.)

Estates tail of bankrupt copyholders, how barred.—By the 12th section of the stat. 21 Jac. 1, c. 19, and which was held to include copyholds, the bargain and sale of the commissioners was a bar to the issue and remainders over of a bankrupt copyholder's entailed copyhold estate. This statute, together with all then existing statutes relating to bankrupts, was repealed by the statute 6 Geo. 4, c. 19, by the 65th section of which the commissioners were empowered and directed to bar such estates tail by deed indented and inrolled in any of his Majesty's courts of record. This last-mentioned Act is, however, repealed by the Fine and Recovery Substitution Act (3 & 4 Wm. 4, c. 74, s. 55), so far as relates to the estates tail of bankrupts, but not so as to affect the lands of any bankrupts so adjudged under any commission or fiat issued previously to the 31st of December, 1833. It then proceeds to empower any commissioner acting in the execution of any fiat which shall be issued after the said 31st of December, 1838, by deed to dispose of the lands

of a bankrupt tenant in tail to a purchaser, and to create by such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become a bankrupt, could have done. (Secs. 56, 57, 58.) And every deed by which any such commissioner as aforesaid shall dispose of lands held by copy of court-roll, shall be entered on the court-rolls of the manor of which the lands may be parcel; and if there shall be a protector who shall consent to the disposition of such lands held by copy of court-roll, and he shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector, either on or at any time before the day on which the deed of disposition shall be executed by the commissioner, and such deed of consent shall be entered on the court-rolls; and it shall be imperative on the lord of every manor of which any lands disposed of under this Act by any such commissioners as aforesaid, may be a parcel, or the steward of such lord, or the deputy of such steward, to enter on the court-rolls of the manor every deed required by this present clause to be entered on the court-rolls, and he shall indorse on every deed so entered a memorandum, signed by him, testifying an entry of the same on the court-rolls. (Sec. 59.) And all acts and deeds done and executed by a bankrupt tenant in tail affecting the entailed lands, and which, if he had been seised in fee, would have been void against his assignees and persons claiming under them, will be equally void against any disposition made by such commissioner under this Act. (Sec. 63.) This disposition of such commissioner will be equally valid,

although the bankrupt be dead at the time of making such disposition. (Sec. 65.)

Of devises of copyholds.—Copyholds, although not rendered devisable by the statutes of wills (32 & 34 Hen. 8), and expressly excluded from the devising operation of the Statute of Frauds (29 Car. 2, c. 3, s. 12), were nevertheless devisable by will made in pursuance of the customs of the manors of which they were holden. If, therefore, the terms of the surrender were pursued, copyholds might have been devised not only by an unattested will (*Semais v. —*, Buls. 200; *Wagstaff v. Wagstaff*, 2 P. Wms. 258; *Burkett v. Burkett*, 2 Vern. 498; *Roe dem. Gilham v. Heyhoe*, 1 W. Black. 1114; *Tufnell v. Page*, 2 Atk. 37; *Att.-Gen. v. Sawtell*, ib. 497; *Marlborough (Duke of) v. Godolphin*, 2 Ves. 77; *Henderson v. Farbridge*, 3 Russ. 482; *Att.-Gen. v. Andrews*, Ves. 225; *Appleyard v. Wood*, Sel. Cas. temp. King, 42; *Carey v. Askeu*, 3 Bro. C. C. 59; *Doe dem. Cook v. Danvers*, 7 East, 299; *Noel v. Hoy*, 5 Mad. 38), but, when warranted by the custom, a will by mere word of mouth would have been sufficient. (Co. Litt. 101, n. a; Wat. Cop. 180; Roll. Abr. 614; *Davenish v. Baines*, 2 Eq. Ca. Abr. 43.) An instrument, also, which purported to be a deed, and upon stamps adapted to that kind of instrument, was held to be a sufficient declaration of the uses of surrender to will. (*Habergham v. Vincent*, 4 Bro. C. C. 353; S. C. 2 Ves. 229.) When, however, the surrender prescribed that the will should be executed in any particular manner, the terms of such surrender must have been complied with; consequently, if a

copyholder had surrendered to such uses as he should appoint by will attested by three witnesses, and such will had been unattested, or attested by a lesser number of witnesses than three, nothing could have passed under it. (*Godwyn v. Kilshe*, Ambl. 684.) And where by the custom of a manor any particular form was required, such form must have been complied with. Thus in *Hodson v. Merest* (9 Pr. 566), where by the custom of the manor lands could not have been transferred but by bargain and sale and admittance, nor devised unless by a conveyance, and declaring the uses of the will, it was held, on a suit by the daughters and heiresses of the devisee, claiming under the heir-at-law of the testator, who had been admitted, that the formalities had not been observed by the testator in conveying to the uses of his will, and that therefore the copyholds, or what were called tenant-right lands, did not pass by the devise. And where the customs of a manor did not require a surrender to the use of a will, such will must have been attested by three witnesses (*Hussey v. Grille*, Ambl. 299; *Willan v. Lancaster*, 3 Russ. 108); and this rule will apply to the equitable as well as to the legal estate, where there is no custom to surrender to the use of the will. (*Ib.*) But where there is a custom to surrender to the use of a will, the *cestui que trust* may, by the same kind of instrument, dispose of the trust estate as if he had the legal estate in him. (*Davie v. Beardsham*, 1 Cha. Cas. 39; S. C. 3 Cha. Rep. 4; 2 Freem. 157; 9 Mod. 75; 1 T. R. 601-2; *Greenhill v. Greenhill*, 2 Vern. 680; *Ardesoife v.*

Bennett, 2 Dick. 465; *Hawkins v. Leigh*, 1 Atk. 387; *Macey v. Shurmer*, ib. 389; *Tufnell v. Page*, 2 Atk. 37; *Car v. Ellison*, 3 ib. 75; *Allen v. Poulton*, 1 Ves. 121; *Attorney-General v. Andrews*, 1 Ves. sen. 225; *Gibson v. Montford (Lord)*, ib. 225.)

Operation and effect of the surrender to will.—

By the general law of copyholds, a surrender to the uses of a will was essential to its testamentary operation (*Murrell v. Smith*, 4 Co. 24, n. b; Co. Cop. s. 36, Tr. 83; Wat. Cop. 122); and Lord Thurlow is reported to have said, that it would seem that a custom denying a copyholder the privilege of surrendering to the uses of his will, could not be supported. (*Pike v. White*, 3 Bro. C. C. 287.) It has, however, been doubted whether Lord Thurlow ever laid down so general a proposition as this. (See Eden & Bell's edition, 286, 288; 1 Evans's Statutes, 450; Mr. Coventry's note to Wat. Cop. 121; and Scriv. Cop. 264, n. e.) And the prevailing opinion seems to be that a custom restraining a copyholder from surrendering to the use of his will, would not be absolutely bad. It appears also that there are some customary estates (chiefly in the north of England) that can only be devised through the medium of a deed of trust, and which, in some instances, must be renewed annually, or after certain periodical intervals, so that if the time of renewing them should be suffered to elapse, or the testator falls into a state of incapacity, the devise becomes inoperative. (1 Ev. Stat. 450.) Still it seems clear that a surrender to the use of a will will be good, though no instance can be found in

the records of the manor in which such a surrender has been made; and even if a custom restraining a surrender to will could be clearly shewn, there must yet be some mode of disposition by deed, as in the case of customary freeholds, the want of which a court of equity would have supplied. (*Church v. Munday*, 15 Ves. 396; and see *Doe dem. Cook v. Danvers*, 7 East, 306.) A surrender, although only to the uses of a will, will operate as a severance of an estate in joint tenancy, and a devise in pursuance of it will be good, although the presentment of it be not made until after the surrenderor's death. (*Constable's case*, cited Co. Litt. 59; *Porter v. Porter*, Cro. Jac. 100; *Allen v. Nash*, 1 Brownl. 127; 8. C. Noy, 152; *Benson v. Scott*, 3 Lev. 385; S.C. 4 Mod. 254; *Gale v. Gale*, 2 Cox, 156; S.C. 2 Ves. 609; *Vaughan v. Atkins*, 5 Burr. 2783; *Edwards v. Champion*, 8 L. T. 512, 513.) A surrender to will, however, only related to such lands as the copyholder was possessed of at the time of such surrender, and would not therefore have passed as copyhold lands subsequently acquired. (*Frank v. Standish*, Exch. 19 Dec. 1772, 1 Bro. C.C. 588, n.; *Goodtitle dem. Faulkner v. Morse*, 3 T. R. 365; *Morse v. Faulkner*, 1 Anstr. 11; *Doe dem. Ibbott v. Cowling*, 6 T. R. 63; *Doe dem. Blacksell v. Tomkins*, 11 East, 185.) Some contrariety of opinion appears to have existed, as to whether a surrender of *after-purchased copyholds* to the uses of a pre-existing will, would have been sufficient to pass them. This it seems it would have done whenever the will contained sufficient general descriptive terms to

embrace them, and the surrender was made to uses already declared, or to be declared; the surrender being, in fact, a republication of the will. (*Denn dem. Harris v. Cutler*, cited Cow. 131; *Heylyn v. Heylyn*, Cow. 130; Lofft. 604; *Attorney-General v. Vigor*, 8 Ves. 286.) But if, on the other hand, the surrender was made to a future appointment, *as to such uses as the surrenderor shall by will appoint*, the after-purchased lands would not have passed by a will made previously, as no such intention would have been inferred where the surrender was made to the use of a will to be made at some future time. (*Warde v. Warde*, Amb. 299; see also *Spring v. Biles*, 1 T. R. 435, n. f.) Still, for all this, a surrender, although made to a future appointment, will be ineffectual as to subsequently-acquired copyholds; it will nevertheless be effectual as to such as the surrenderor was possessed of at the time of making his will. This distinction was adopted in the case of *Spring v. Biles* (1 T. R. 435, n. f), where it was held that although copyholds purchased subsequently to the date of the will did not pass under a surrender to such uses as the testator by his last will and testament should appoint, yet that the copyholds of which he was seised at the time of making his will did pass by such surrender. And where a surrender is made to a future appointment, such appointment may be made by will without any fresh surrender to the use of that will. (*Cuthbert v. Lempriere*, 3 Mau. & Selw. 158, n. a.) An equity of redemption until the mortgagee was admitted could not have passed by an unsurrendered will,

because until the admission of the mortgagee the lands were as much the subject of the surrender as they were before the mortgage. (*Floyd v. Aldrige*, 5 East, 137, cited; *Doe dem. Shewen v. Wroot*, 5 East, 138; *Kenebal v. Scrafton*, 8 Ves. 30; *Perry v. Whitehead*, 6 ib. 544; *Wainwright v. Rhwell*, 1 Mad. 627.) But after the admittance of the mortgagee, the mortgagor having a mere trust estate, might have devised the same by an unsundered will. (*Macnamara v. Jones*, 1 Bro. C. C. 481; *King v. King*, 3 P. Wms. 360; *Strudwicke v. Strudwicke*, ib. n. 1, Cox's edit.; *Greenhill v. Greenhill*, Gilb. Eq. Rep. 79; *Brent v. Best*, 1 Vern. 69; see also *Martin v. Mowlin*, 2 Burr. 979.) Nor would the accession of the legal fee have effected the equitable estate previously devised. (Wat. Cop. 124, 125.)

When equity would have supplied a surrender.
—In certain cases where a surrender was requisite to give validity to the will, a court of equity, by analogy to the aid it affords in instances of a defective execution of a power, would have supplied that omission: as in favour of a wife (*Strode v. Falkland* (Lord), 3 Cha. Rep. 187; *Biscoe v. Cartwright*, Gilb. Eq. Rep. 121; *Tollet v. Tollet*, 2 P. Wms. 489; *Hawkins v. Leigh*, 1 Atk. 388; *Smith v. Baker*, ib. 385; *Taylor v. Taylor*, ib. 386; *Roome v. Roome*, 3 ib. 181; *Goodwyn v. Goodwyn*, 1 Ves. 228; *Byas v. Byas*, 2 ib. 164; *Tudor v. Anson*, ib. 582; *Marston v. Gowan*, 3 Bro. C. C. 170; *Chapman v. Gibson*, ib. 229; *Rumbold v. Rumbold*, 3 Ves. 65; *Hills v. Down-ton*, 5 Ves. 557; *CAurch v. Mundy*, 12 Ves. 429;

Fielding v. Winwood, 16 Ves. 90; *Wat. Cop. Fonbl. Eq.* 38, 39), children (*Smith v. Ashton*, 1 Cha. Cas. 263; *Hardham v. Roberts*, 1 Vern. 132; 2 ib. 164; *Kettle v. Townsend*, 1 Salk. 187; *Bradley v. Bradley*, 2 Vern. 163; *Croft v. Lister*, cited ib. 164; *Bath and Montague's case*, 3 Cha. Cas. 106; *Baker v. Jennings*, 2 Freem. 234; *Pope v. Garland*, 3 Salk. 84; *Strode v. Falkland (Lord)*, 3 Cha. Rep. 187; *Watts v. Bullas*, 1 P. Wms. 60, and n. 1, 2 ib.; *Bullock v. Bullock*, 6 Vin. Cop. M. (a), pl. 19; *Burton v. Lloyd*, ib. pl. 20; S. C. 3 P. Wms. 285 n. a; S. C. 2 Bro. P.C. 281 (by name *Lloyd*, App. *Burton*, Resp.); *Weeks v. Gore*, 6 Vin. Cop. M. (a), pl. 24; *Suffolk (Earl of) v. Howard*, 2 P. Wms. 178; *Tollet v. Tollet*, ib. 489; *Carter v. Carter*, Mos. 370; *Andrews v. Waller*, 6 Vin. Cop. W. (e), pl. 12; *Hicken v. Hicken*, ib. M. (a), pl. 30; S. C. Ca. temp. Talb. 35; *Hawkins v. Leigh*, 1 Atk. 388; *Macey v. Shurmer*, ib. 389; *Roome v. Roome*, 3 ib. 181; *Goring v. Nash*, ib. 191; *Banks v. Denshaw*, ib. 585; *Goodwyn v. Goodwyn*, 1 Ves. 228; *Byas v. Byas*, 2 ib. 164; *Tudor v. Anson*, ib. 582; *Lindopp v. Eborall*, 3 Bro. C. C. 188; *Chapman v. Gibson*, ib. 229; *Pike v. White*, ib. 286; *Rumbold v. Rumbold*, 3 Ves. 65; *Hills v. Downton*, 5 ib. 563; *Blunt v. Clitherow*, 10 Ves. 589; *Garn v. Garn*, 16 ib. 228; *Pennington v. Pennington*, 1 Ves. & Bea. 406; *Sampson v. Sampson*, ib. 337; *Brad-dick v. Mattock*, 6 Madd. 361), or creditors (*Challis v. Casburn*, Pre. Cha. 407; S. C. Gilb. Eq. Rep. 96; 1 Eq. Ca. Abr. 124; *Pope v. Garland*, 3 Salk. 84; *Strode v. Falkland (Lord)*, 3 Cha.

Rep. 187; *Drake v. Robinson*, 1 P. Wms. 443; *Harris v. Ingledew*, 3 ib. 98; ib. n. 2; *Hazlewood v. Pope*, ib. 322; *Mallabar v. Mallabar*, Ca. temp. Talb. 78; *Atty.-Gen. v. Mott*, 2 Eq. Ca. Abr. 234, pl. 23; *Car v. Ellison*, 3 Atk. 73; *Roome v. Roome*, ib. 181; *Ithall v. Beane*, 1 Ves. 215; *Byas v. Byas*, 2 Ves. 164; *Tudor v. Anson*, ib. 582; *Coombes v. Gibson*, 1 Bro. C. C. 273; *Bixley v. Eley*, 2 ib. 325; *Lindopp v. Eborall*, 3 ib. 188; *Chapman v. Gibson*, ib. 229, n. 1; *Watte v. Bullas*, 1 P. Wms. 60; *Kentish v. Kentish*, 3 Bro. C. C. 257; *Growcock v. Smith*, 2 Cox, 397; *Hills v. Downton*, 5 Ves. 563; *Kidney v. Cousmaker*, 12 Ves. 136; *Pennington v. Pennington*, 1 Ves. & B. 406); which equity is equally applicable to lands of gavelkind and borough English tenure. (*Bradley v. Bradley*, 2 Vern. 165; *Cooper v. Cooper*, ib. 265; *Byas v. Byas*, 2 Ves. sen. 164.) The ground of this equitable interference was a legal and moral obligation; and therefore equity would not have interfered in a capricious or arbitrary manner, unless the necessity or justice of the case demanded it, nor have assisted to disinherit the heir where it was equally consistent with justice that he should have succeeded to the property (Wat. Cop. 133; Gilb. Ten. 157, n. k, 412); consequently, although the surrender would have been supplied in favour of the creditors, this case would only have extended to the amount of the debts, the heir having at least equal equity with the devisee, and therefore his legal right would have prevailed. (*Compton v. Collinson*, 2 Bro. C. C. 386; 3 ib. 171; Wat. Cop. 141; Scriv. Cop. 271.)

Nor would a surrender have been supplied in favour of natural children (*Tudor v. Anson*, 2 Ves. 282; *Holmes v. Coghill*, Fearn, Posth. Works, 328; *Crickett v. Dolby*, 3 Ves. 12; *Fursaker v. Robinson*, 12 Ves. 209), or of a brother or sister; so that it was of course excluded in favour of a nephew, niece, cousin, or more remote relations (*Goodwyn v. Goodwyn*, 1 Ves. 228; *Strode v. Fulkland (Lord)*, 2 Vern. 605; *Marston v. Gowan*, 3 Bro. C.C. 169; *Rogers v. Downs*, 9 Mod. 292; *Judd v. Pratt*, 13 Ves. 168; 15 ib. 30), and still more so of strangers or volunteers, as a devisee or legatee (*Floyd v. Wallis*, cited 5 East, 137); nor even in favour of the wife and children, if the will contained a provision for them. (*Ross v. Ross*, 1 Eq. Ca. Abr. 124, pl. 14; *Lindopp v. Eborall*, 3 Bro. C. C. 188; *Tudor v. Anson*, 2 Ves. sen. 582.) It was also decided in the House of Lords that a surrender would not even be supplied in the case of a grandchild (*Kettle v. Townsend*, 1 Salk. 187; 1 Eq. Ca. Abr. 123); and, notwithstanding this decision was often disapproved of (*Watts v. Bullas*, 1 P. Wms. 61; *Freestone v. Rant*, 1 P. Wms. 61, n. †; *Fursaker v. Robinson*, 1 Eq. Ca. Abr. pl. 9), and its authority even doubted (*Hills v. Downton*, 5 Ves. 563), Lord Eldon held that the rule laid down by the House of Lords could not be reversed in a court of equity, but must remain till altered by the House. At the same time, although he dismissed the bill, he refused to give costs; observing, it was impossible to do so where the plaintiffs had so much encouragement from *dicta*. (*Perry v. Whitehead*, 6 Ves. 544.) These ques-

tions are, however, only applicable to the wills of copyholders dying previously to the statute of 55 Geo. 3, c. 192, already referred to, which dispenses with the necessity of a surrender to the use of a will. And even as to wills made previously, if the possession has been long peaceably held—as, for forty years, for instance, a surrender will be presumed. (Wat. Cop. 144; *Knight v. Adamson*, 1 Freem. 106; *Lydford v. Coward*, 1 Vern. 195; *Wilson v. Allen*, 1 Jac. & Walk. 620.)

Operation of stat. 55 Geo. 3, c. 192, on wills of copyholds.—The necessity of a surrender to the use of a will was dispensed with by the statute of the 55 Geo. 3, c. 192, by which it is enacted that devises of copyholds shall be good without surrender to the use of a will. (Sec. 1.) It however provides that the same duties and fees shall continue payable as have been paid on surrenders. (Sec. 2.) The Act is not to render invalid any devise or disposition that would have been valid; nor to render valid such as would have been invalid if a surrender had been made to the use of the will. (Sec. 3.) This statute, it has been determined, supplies a surrender only in point of form, and therefore does not render copyholds devisable which were not so otherwise, or supply an act necessary to give validity to the devise beyond the simple act of surrender. Hence if a *feme covert* were incapable of devising her copyhold land except through the medium of a surrender to will under the sanction and protection of the private examination by the lord or steward as to her uncontrolled assent, the Act will not supply a surrender unaccompanied with

these formalities—this being a surrender in substance intended to protect the acts of a married woman, which protection the Legislature did not intend to deprive her of. (*Doe dem. Nethercote v. Bartle*, 5 Barn. & Ald. 492; S. C. 1 Dow. & Ry. 81.) How far this statute would be operative upon a general devise of lands where the testator had both freehold and copyhold property, seems to have been a matter of some doubt. Before the statute, unsundered copyholds would not have passed under a general devise of lands, unless the testator had no freeholds upon which the will could operate (*Byas v. Byas*, 2 Ves. sen. 164; *Hawkins v. Leigh*, 1 Atk. 387; *Smith v. Baker*, ib. 385; *Car v. Ellison*, 3 ib. 73; *Lindopp v. Eborall*, 3 Bro. C. C. 188; *Tudor v. Anson*, 2 Ves. sen. 582; *Church v. Mundy*, 12 Ves. 426; S. C. 15 ib. 396; *Milbourn v. Milbourn*, ib. 400; *Nicholls v. Butcher*, 18 ib. 193; *Hodgson v. Merest* 9 Pri. 556; *Pennington v. Pennington*, 1 Ves. & Bea. 406), and then only in favour of wife, children, and creditors (as to which see *antè*). But surrendered copyholds would have passed under such general devise. (*Scott v. Alberry*, Com. Rep. 337; *Tendril v. Smith*, 2 Atk. 85; *Goodwyn v. Goodwyn*, 1 Ves. sen. 226.) Now the statute of the 55 Geo. 3, c. 192, by dispensing with the necessity of a surrender, places freeholds and copyholds *in pari passu* with regard to the operation of a general devise; or in other words, places unsundered copyholds in the same situation, with respect to the operation of a general devise, as surrendered copyholds would have been prior to the passing of the Act. This certainly seems to be the

better opinion (see 2 Jarm. on Wills, 121, *et seq.*), though some gentlemen of eminence have expressed strong doubts upon the point. Now, under the recent Will Act, 1 Vict. c. 26, a general devise of the testator's lands is made to include copyholds, unless a contrary intent shall appear by the will. (Sec. 26.) Another doubt arising upon the construction of the statute 55 Geo. 3 was, whether it would embrace an unadmitted heir-at-law; but the better opinion seems to be that it would have done so, because he is a complete tenant before admittance, against all persons except the lord, in respect of his fine. An unadmitted purchaser, having only an equitable interest, might, as already stated, have devised his interest without a surrender, even independently of the statute; but an unadmitted devisee could not have done so, the latter having, as we have already seen, no equitable title distinct from his incomplete legal title. (*Wainwright v. Elwall*, 1 Madd. 637.) Neither is he a "copyhold tenant" within the meaning of the Act, which therefore confers no more devising power upon him than he enjoyed previously.

Alterations effected by the recent Will Act.—The recent Will Act (1 Vict. c. 26, s. 3), after enacting that all copyholders may devise without surrender, empowers unadmitted heirs or devisees to devise their copyhold estates. (Sec. 3.) The same fees and fine are, however, payable, as if the surrenders and admissions had been all actually made. (Sec. 4.) And all wills, or extracts of wills, of copyholds or customary freeholds, are required to be entered on the court-rolls. (Sec. 5.)

Distinction between copyhold and customary freeholds.—The chief distinction between customary freeholds and copyholds consists in the former being holden according to the custom of the manor, and not at the will of the lord, according to the custom of the manor. (*Hughes v. Harrys*, Cro. Car. 229; *Gale v. Noble*, Carth. 422; *Rogers v. Bradley*, 2 Ventr. 144; *Hill v. Bolton*, Lutw. 1171; *Crouther v. Oldfield*, ib. 125; S.C. 1 Salk. 365; 6 Mod. 19; 11 ib. 53; 2 Lord Raym. 1225.) Lord Coke styles these customary freeholds as copyholds of frank tenure, which, he observes, “are most usual in ancient demesne; though sometimes,” he adds, “out of ancient demesne we meet with the like kind of copyholds; as in Northamptonshire there are tenants which hold by copy of court roll, and yet hold not at the will of the lord.” (Co. Cop. s. 32; see also Kitch. Cop. 159; Scriv. 666.) This omission to hold at the lord’s will seems, however, to form the chief distinction which now exists between copyholds and customary freeholds, the latter of which, except when varied by custom, are subject to the general law of copyholds, although in some instances they are by custom transferable by deed and admittance, and not by surrender. (*Doe v. Huntingdon*, 4 East, 271; *Bowin v. Rawlins*, 7 East, 409.) But by whatever mode of assurance they may be transferred, the freehold will always remain in the lord. Still, for all this, where they pass by deed and admittance, they are considered as so far partaking of a freehold nature as to fall within the Statute of Frauds, and consequently could not, previously to the statute 1 Vict. c. 26, have passed

by will, unless they were attested by three witnesses. (*Hussey v. Grills*, Amb. 299; *Willan v. Lancaster*, 3 Russ. 108.)

Ancient demesne.—Ancient demesne consists of those lands or manors as were held in socage of manors belonging to the Crown in the time of Edward the Confessor or William the Conqueror, and so appear by Domesday Book. (F. N. B. 14; 2 Black. Comm. 99; Kitch. 187, 190; *Gentleman's case*, 6 Co. 11, b.) There are said to be three sorts of tenants in ancient demesne: 1. Those who hold lands freely by grant of the king; 2. Those who hold of a manor which is ancient demesne, but not at the will of the lord, and who are in fact customary freeholders; and 3. Those who hold of a manor which is ancient demesne, but at the will of the lord, like ordinary copyholders. The two former could only be impleaded in their lords' courts by a writ of right close, and if otherwise impleaded, they might have pleaded the tenure in abatement; but the third class of tenants, holding as copyholders at the will of the lord, were to sue by plaint in the lord's court. It was upon this writ of right close that fines and recoveries were formerly suffered of lands in ancient demesne; and a recovery suffered in a court of ancient demesne, according to the custom of the manor, was an effectual bar to the entail. A fine, indeed, might have been levied, or a recovery might have been suffered, in the Common Pleas; but then, as the operation of those proceedings in the latter court would have rendered the land frank-free so long as they remained in force, to the prejudice of the lord, he was enabled to reverse the

same by a writ of deceit. And now, by the Fine and Recovery Substitution Act (3 & 4 Wm. 4, c. 74) fines and recoveries of lands in ancient demesne, when levied or suffered in a superior court, may be reversed as to the lord by writs of deceit, but will remain good and valid as against the consors thereof, and all persons claiming under them, as such fines and recoveries would have been if the same had not been so reversed by such writ of deceit. (Sec. 4.) It next proceeds to enact that fines and recoveries of lands in ancient demesne, levied or suffered in the manor court, after other fines and recoveries suffered in any of the superior courts, shall be as valid as if the tenure had not been changed; and that in every other case where fines and recoveries, though levied or suffered in those courts whose jurisdiction may not extend to the lands comprised therein, shall not be invalid on that account. (Sec. 5.) And it further enacts, that in every case where the tenure of ancient demesnes has been suspended or destroyed by fine or recovery in a superior court, and the lord should not have reversed the same before the 1st of January, 1834, and should not, by any law in force on the 1st day of the then present session of parliament, be barred of his right to reverse the same, such lands, provided within the last twenty years immediately preceding the 1st of January, 1834, the right of the lord shall have been acknowledged or recognised, shall again become parcel of the manor and become subject to the same rents, heriots, and services, as they would have been subject to if such fine or recovery had not been

levied or suffered; and that no writ of deceit for the reversal of any fine or common recovery should be brought after the 31st of December, 1833. (Sec. 6.)

Customary lands of the duchy of Cornwall.—Before I take leave of this part of my subject, it will be proper to make a few remarks upon some important alterations that have been made in the customary lands of the ancient duchy of Cornwall, by the recent statute, 7 & 8 Vict. c. 105. These lands are holden of certain manors, termed assessionable manors, of which the Duke of Cornwall is the lord, under a charter granted by King Edward the Third. The estates of the tenants are styled conventional tenements, and were held under grants made and renewed at the assession courts, once in seven years, upon surrender and admittance of the tenant being considered to be held as customary estates of inheritance, with a perpetual right of renewal. Latterly, however, disputes arose between the officers of the duchy and the conventional tenants with respect to the minerals, which although undoubtedly the property of the Duke of Cornwall, his right to enter on the tenements for the purpose of working any mines was disputed; and in consequence of these misunderstandings, and it seems, also, some differences respecting the boundaries, no assessionable courts were held subsequently to the year 1833. At last, commissioners were appointed to ascertain the rights of the different parties; and, to carry out this important object, the Act now under consideration was framed. This Act (7 & 8 Vict. c. 105) recites first the facts just

before alluded to, and that it was expedient that the estates of the tenants in the conventional tenements should be converted into freehold, on the terms and conditions thereafter mentioned; and that the rights of the Duke of Cornwall, and all other persons, in respect of the mines, minerals, stone, and substrata of the said conventional tenements, should be established and regulated, which could not be effected without the aid and authority of Parliament. It then proceeds to confirm the estates of the conventional tenements, granted at the last assession courts for the manors mentioned in the first schedule annexed to the Act, and which, if duly renewed, would have been held as such conventional tenements, continuously for sixty years or more, before the 1st of May, 1844, and for the same estates and interests as the same would have been held, if the grants thereof had been duly renewed; but subject, nevertheless, to the accustomed fines for renewal, heriots, rents, payments, fees, and services; and subject to all existing rights of the Duke of Cornwall, and his lessees, and other persons claiming under him, with respect to mines, minerals, stone, and substrata. (Sec. 1.) It next proceeds to appoint commissioners to inquire and ascertain what lands and tenements in the several manors mentioned in the schedules annexed to the said Act, were held as conventional tenements, and the boundaries, identity, and situation of all such tenements, for the period therein set forth (secs. 2 to 31); and directs the commissioners, when they shall have made all such inquiries, to make an award in writing

under their hands, and to annex to such award a map or maps, and thereby to distinguish, specify, and determine what lands and tenements had been holden as conventional tenements within the said several manors respectively for the last sixty years. (Sec. 31.) And such award is declared to be binding and conclusive on the Duke of Cornwall, and all persons whomsoever. (Sec. 40.) And all and singular the tenements therein determined to be conventional are made of freehold tenure, and to be for ever thenceforth held of the Duke of Cornwall in free and common socage of the manor of which the same tenements had theretofore been held ; charged, however, with the payment to the Duke of Cornwall, as lord of such manors respectively, of all arrears of rents, fines, acknowledgments, heriots, fees, payments, or services, and of such annual sum as should be directed to be payable thereout respectively, and that the Duke of Cornwall should have the same remedies for recovering the same as for rent reserved on a demise. (Sec. 41.) The Act does not, however, confirm conventional tenements first granted within sixty years (42) ; still it provides that where such grants have been made, if it shall appear to the Duke of Cornwall that the circumstances under which such grant has been made are such as would reasonably and fairly entitle the person in possession, by virtue of such grant, to compensation for the loss of his beneficial interest in respect thereof, then it should be lawful for the Duke of Cornwall to grant or demise such conventional tenement to such person for such term, estate, or interest, and subject to such rent,

reservations, conditions, and agreements, as to the said Duke of Cornwall shall seem to be just and reasonable in reference to such circumstances as aforesaid ; but so, nevertheless, that all tenements so granted or demised shall continue and be part and parcel of the demesne lands of the manor within which the same are situate, and shall be held of the same manor accordingly. (Sec. 43.) The commissioners are also empowered to award lands in compensation of common of pasture, or of turbary. (Sec. 44.) And immediately after the said award, every conventional tenement which should thereupon become holden in free and common socage, should stand limited and settled to such uses, upon such trusts, and such powers, provisoes, and agreements, as should most nearly correspond with the interests, uses, and trusts, which, before the making of such award, were, according to the custom of the said manor, subsisting, or capable of taking effect in such conventional tenement ; but so, nevertheless, that (subject and without prejudice to such estates, interests, uses, powers, provisoes, and agreements, as shall be then subsisting and capable of taking effect) every such tenement, and every estate and interest therein, should, at all times after the making of the said award, descend, devolve, be conveyed and assured, according to and in every respect subject to the laws according to which other tenements holden in free and common socage descend ; devolve, are conveyed and assured, and subject ; and that every such freehold tenement, and every estate and interest therein, should be subject and liable to all claims and demands, if any, to

which the conventional tenement out of which the same was converted was subject or liable, immediately before such conversion, other than claims and demands by the Duke of Cornwall, as lord of the manor of which the same is held. (Sec. 46.) The Act afterwards enacts, that all mines and metallic minerals under the conventional lands are to belong to the Duke of Cornwall (secs. 53, 54), who is thereby empowered to enter and work them, making compensation for the damage to the surface, and for use of stone and water (sec. 55); which compensation, in case of dispute, is to be settled by two justices, or by the vice-warden, at the option of the party liable. (Secs. 56, 57.) But where such entry is to be made for the purpose of working mines of any but the waste lands, the Duke of Cornwall is directed to give one calendar month's previous notice in writing of such intended entry to the occupier of such lands. (Sec. 60.) And all lessees or other persons (other than the Duke of Cornwall), who shall intend to enter as aforesaid, other than on the waste lands, may be compelled to give security for any surface damage he may do to the property. (Sec. 61.) But the Duke of Cornwall himself is not to be liable for any damage done by his lessees (sec. 66); nor is any compensation to be allowed for damage done to the waste or demesne lands.

Claims of the duchy, how to be barred by Statutes of Limitation.—The Statutes of Limitation were for the most part considered inapplicable to the lands and possessions of the duchy of Cornwall, to remedy which the above-mentioned stat. of 7 & 8

Vict. enacts, that the claims of the Duke of Cornwall shall generally be barred at the end of sixty years (sec. 71); that his claims shall not be kept alive by putting a manor in charge of which the land shall be part (sec. 72); that his claims to mines shall be barred by the possession of the land and exclusively working the mines for sixty years (sec. 73), or by the absolute possession of the land, independently of the Duke of Cornwall, for 100 years. (Sec. 74.) But time, as to reversions, is not to begin to run till they fall into possession (sec. 76); nor to hereditaments which have been granted for limited estates, until such estates fail. (Sec. 77.) Neither will this Act bar the duke as to the property comprised in the award (sec. 81); nor affect the privilege of tinners (sec. 84); nor extend to the royalties, liberties, offices, &c. let in convention; nor to navigable rivers, estuaries, branches of the sea or seashore (sec. 86); nor affect the Act of 2 & 3 Wm. 4, c. 100, for shortening the time required in claims of *modus decimandi*, &c. (Sec. 87.)

CHAPTER II.

ON INCUMBRANCES.

I. OF THE VARIOUS KINDS OF INCUMBRANCES.

1. *Incumbrances which are Matters of Title.*
2. *Incumbrances which are Matters of Conveyance only.*

II. OF PROTECTION AGAINST PRIOR AND INTER-MEDIATE ESTATES AND INCUMBRANCES.

1. *Protection at Law.*
2. *Protection in Equity.*
3. *Of Notice.*

SECTION I.

OF THE VARIOUS KINDS OF INCUMBRANCES.

1. *Incumbrances which are Matters of Title.*
2. *Incumbrances which are Matters of Conveyance only.*

HAVING said thus much about estates in real property, and the terms by which they may be created, settled, and disposed of, it next becomes my duty to offer some remarks upon incumbrances. This subject affords matter of most important consideration in the investigation of titles, and the nature and quality of every kind of incumbrance ought to be thoroughly understood, as also how far courts of law and equity will interpose to protect

a purchaser against them ; for upon this doctrine must the practicability of conferring a marketable title oftentimes depend. If the incumbrances are of that nature that the vendor is unable to discharge the property from them, they must prove a fatal objection to the title. But if, on the other hand, he can obtain a release or conveyance from the incumbrancers, the objection will then become merely matter of conveyance, which may be cured by the incumbrancers joining in the assurance. (3 Prest. Abs. 284.) By the concurrence, indeed, of the necessary parties, most incumbrances, even that are matter of title, may be got rid of ; but as the vendor has not the power of commanding this concurrence, the purchaser will be entitled to treat the title as unmarketable whenever this defect occurs, and to abandon the contract accordingly.

What incumbrances are matters of title, and what of conveyance.—Incumbrances which are matters of title may be ranked under the following heads :—Executory devises, conditional limitations, conditions at common law, remainders not barrable (as remainders in a settlement, which are supported by a protector), leases, jointures, dower, curtesy, annuities and rent-charges, bankruptcy and insolvency in the vendor, forfeitures, and powers. Incumbrances which are merely matters of conveyance may be classified as mortgages, crown debts, judgments, statutes, recognizances, decrees, *lis pendens*, debts, portions, and legacies ; and the legal estate being outstanding in trustees, satisfied mortgagees, or the trustees of attendant terms.

1. *Incumbrances which are Matters of Title.*

Of executory devises, conditional limitations, and conditions at common law.—An executory devise cannot, generally speaking, be barred by the first taker; consequently, where an estate is limited to one in fee-simple, with a limitation over by way of executory devise, no act of such first taker can bar such executory limitation over. (*Pells v. Brown*, Cro. Jac. 590.) But where the executory limitation over is to arise after an estate tail, it would then be in the nature of a conditional limitation; and in that case a recovery would formerly, and a disentailing deed will now (unless there be a protector to the settlement who refuses his consent), effectually bar the estates depending on that event or condition, provided the assurances were completed before the event or condition takes place. (*Page v. Hayward*, 2 Salk. 570; *Gulliver dem. Corrie v. Ashby*, 4 Burr. 1929; *Fountain v. Gooch*, 4 Bac. Abr. (D); *Driver dem. Edgar v. Edgar*, Cow. 379.) A condition at common law also forms a fatal objection to a title; because no act of the party whose estate is burdened with it can defeat such condition; nor has he any power to compel the party entitled to the benefit of it to release his right therein, however large the amount of compensation he may offer. Still it is not such a defect as to be absolutely without remedy, for if the party entitled to the benefit of the condition is labouring under no legal disability, and chooses to release his claim and interest, he may clearly do so, and then the defect will be cured. The existence

of a protector to a settlement who refuses to consent will always be a fatal objection to a title, as, without such consent, nothing more than a base fee can be conveyed to the purchaser, and no court of law or equity can compel such protector either to give or withhold his consent to the disposition of the tenant in tail. (Stat. 3 & 4 Wm. 4, c. 74, ss. 34, 35, 36, 37.)

Leases.—Mr. Preston, in his valuable Treatise on Abstracts, p. 400, remarks that “leases are, or are not, to be considered as incumbrances, according to the terms of the contract. Sometimes the object is to obtain the possession, or for the sake of granting a lease for the utmost value to the old or to a new tenant. Under these circumstances, a lease which deprives a purchaser of the possession, or which deprives him of the right to have the full value from the tenant, is an incumbrance of the most serious nature. In some instances,” he adds, “such an incumbrance is a fit subject for compensation by abatement of the purchase-money; in other instances, as where a farmer or a gentleman buys for occupation, it is a ground for a court of equity to rescind the contract, or to withhold relief when the vendor applies for a specific performance.”

It does not, however, appear that questions have often arisen upon this subject, the cause of which is probably owing to the circumstance of its being well known to the Profession, that the simple act of possession by a tenant is constructive notice of a lease, and the terms under which it is held; and this renders it incumbent on a purchaser to take notice of the nature and extent of the tenant's

interest, which if he fails to do, he must abide by the consequences of his neglect. (*Taylor v. Stibbert*, 2 Ves. 437; *Denn v. Cartwright*, 4 East, 29.)

Jointures, dower, curtesy, annuities, and rent-charges.—Jointures, dower, curtesy, annuities, and rent-charges are matters of title; for parties so entitled have a right independently of the vendor, and are under no obligation, or capable of being compelled by him, to concur in the conveyance, or to release their interest in the property, whatever compensation he may offer them for so doing; and whenever the concurrence of a party is requisite, who is not bound to join, the title can never be considered perfect, until it be shewn that such concurrence has been given. (*Lewin v. Guest*, 1 Russ. 325, 329; and see *Elliott v. Merryman*, Barnard, 82; *Wynn v. Williams*, 5 Ves. 130; *Page v. Adam*, 10 L. J. 407, N. S.)

Bankruptcy, insolvency, forfeiture, &c. — Bankruptcy and insolvency in the vendor will also be a fatal objection to the title, as the bankrupt or insolvent has no longer a power of disposition over the property. (See further on this subject, *antè*, vol. i. pp. 163—170.) The like observations are also applicable to persons who have done any act that would cause a forfeiture of their estate. (See *antè*, vol. i. p. 177, *et seq.*)

Powers.—Whether a power is to be treated as an incumbrance will depend upon whether it is vested in the vendor or in a third party. If vested in the former, as he may extinguish it by his appointment, it will be no incumbrance. But when the power is vested in a third party, then to the

extent to which such power may be exercised, it must be considered as an incumbrance, and to that extent the title must be treated as defective, which can only be gotten rid of where an effectual release can be obtained of the benefit to arise from such power (3 Prest. Abs. 287); still, it seems that where a power is wholly collateral, or, in other words, is conferred upon a person who has no estate or interest in the land, it is incapable of being released or extinguished by any mode of assurance whatever, though it is clearly otherwise with regard to powers appendant or in gross. (*Albany's case*, 1 Rep. 110, n. b; *Digge's case*, ib. 173, n. a; *Edwards v. Slater*, 3 Bulstr. 30; *Bird v. Christopher*, Sty. 389; *King v. Melling*, 1 Vent. 225; *Savile v. Blacket*, 1 P. Wms. 777.) It will not, therefore, be irrelevant in this place to attempt to point out the distinction between these several kinds of powers, which may be classified as collateral powers, powers appendant, and powers in gross. A collateral power is where the party to whom it is limited takes no estate or interest whatever in the land—as, for example, where a power is given to executors to sell their testator's real estate. A power appendant is where the use or estate to be created by the power takes effect in possession during the continuance of an estate, which the donee hath in possession or remainder, and therefore wholly or partially overreaches it; as in the instance of the power usually reserved in settlements to tenants for life to make leases, and to sell and exchange the settled property. And powers in gross are where the person in whom they are vested has an estate

in the lands; but the estate to be created under the power is not to take effect until such estate is determined; and therefore does not, as in the instance of an appendant power, overreach the estate of the donee. Such is the power of jointuring commonly inserted in marriage-settlements. (*Edwards v. Slater*, Hard. 410.) And where a person takes distinct estates under the same settlement, the same power is sometimes a power appendant with respect to one estate, and a power in gross with respect to the other. Thus, where land is limited to the use of A for life, remainder to his sons successively in tail, with remainder to the heirs of his body, with a power to jointure and to create a term for securing the same, these powers in respect to A's estate for life are powers in gross; and in respect of his remainders in tail, are powers appendant. (Co. Litt. 342, b. n.; Com. Dig. 146.) It would also seem that a power for a tenant for life to appoint his estate amongst his children, would also fall within the terms of a power in gross, because, like a jointure, it is not to take effect until after the determination of the donee's estate; but for all this, the Profession were formerly in the habit of treating it as a collateral power, or a mere right of selection amongst certain objects, and incapable of being extinguished by any act of the donee, and many titles were objected to in consequence. But this doctrine has been completely overruled by recent decisions, which have expressly determined that a power of this kind may be destroyed. (*Horner v. Swann*, 1 Turn. & Russ. 430; *Bickley v. Guest*, 1 Russ.

& Myl. 440; *Smith v. Death*, 5 Madd. 371; 1 Bligh. 15.) In point of fact, no difference in quality exists between a power for a tenant for life to make a jointure after his death, or to appoint amongst his children at that period. Both confer a power of selection or specification; neither the one nor the other takes effect out of his interest, for the estates appointed cannot possibly take effect until his interest is determined; but both taking effect after that determination, are powers in gross, and not powers *collateral*, and may be extinguished by release to any one who has an estate of freehold in the lands, whether in possession or reversion. (*Albany's case*, 1 Rep. 110; *West v. Berney*, 1 Russ. & Myl. 431; *Bickley v. Guest*, 1 Russ. & Myl. 440.)

All estates which the power cannot overreach are incumbrances.—Mr. Preston observes, that as often as a title is derived under a power, it is of importance to treat as incumbrances all estates which cannot be overreached and defeated by the exercise of it. For, as he justly proceeds to remark, the power may overreach some of the estates without affecting others of them; as in the instance of a title in which A is tenant for life, with remainder to B in fee, and there is a settlement by both of them to the use of A for life, with various remainders over, with a power to sell without prejudice to the estate for life, or with a power to revoke all the uses, except the uses by which the estate for life is limited; which, he adds, is only one of the numerous and almost infinite examples which might be adduced on this point. (See 3 Prest. Abs. 287.)

2. Incumbrances which are Matters of Conveyance only.

Incumbrances, however great in amount, form no objection to the title where it is in the vendor's power to get them in, or to compel the incumbrancer to join in the conveyance, notwithstanding such charges should exceed the actual amount of the purchase-money. (*Townsend v. Champernown*, 1 You. & Jerv. 449.)

Mortgages.—It seems that mortgages were formerly considered to form not only a matter of conveyance, but of title also ; but they are now determined to be merely matter of conveyance ; consequently, where an estate is contracted to be sold free from incumbrances, and upon the production of the abstract of title it appears that the estate is subject to a mortgage, it will form no objection to the title ; because it is in the power of the mortgagor, until barred by foreclosure, to compel the mortgagee to reconvey, on payment of principal, interest, and costs. (*Stephens v. Guppy*, 1 You. & Jerv. 450, cited ; *Rawson v. Tasburgh*, ib. cited ; *Townsend v. Champernown*, ib. 449.) But it seems that if, by the terms of the mortgage, the mortgagor is, by his own act and deed, precluded from compelling the mortgagee to recovery,—as where, by the terms of the mortgage, the mortgage is not to be redeemed until the expiration of some specific period, which will not expire before the time of completing the contract,—then the mortgage will become a matter of title ; the mortgagor having no power to compel the mortgagee to reconvey

before such specified period shall have elapsed, and without whose concurrence no legal title can possibly be conferred.

Crown debts.—Formerly the Crown had a lien on the real estate of all receivers being immediate accountants, or their sureties, not merely from the time of their appointment to the office (*Attorney-General v. Risby*, Hard. 378; *Dodington's case*, Cro. Eliz. 545; *Nicholls v. How*, 2 Vern. 389; *Brassey v. Dawson*, 2 Str. 978; *Wilde v. Forte*, 4 Taunt. 334), but even when the debt had been contracted subsequent to the alienation (10 Co. 55, 56; *Rex v. Rawlings*, 12 Pri. 834), upon the principle (though rather a harsh one, it must be confessed, as far as an innocent purchaser is concerned) that all lands being held mediately or immediately of the Crown, are considered as bound for the payment of such debt, in just the same manner as if there had been a reservation to that effect on the original grant (Bac. Abr. tit. "Execution;" Cross on Lien, 121); nor can even a term of years assigned to attend the inheritance be relied on as a protection against crown debts in favour of a purchaser; for though it seems that if he purchases without notice of the incumbrance, and can get a term assigned to him that has never been assigned to attend for the crown debtor, it will be a protection; yet it will be otherwise where it has been assigned for such crown debtor, and the term will, in the latter case, be subject to the crown debt. (*Rex v. Lamb*, 13 Pri. 649; *Rex v. Son*, ib. 655, cited. See also *Rex v. St. John*, 2 ib. 317; *Rex v. Hollier*, ib. 394.) Nothing,

in fact, but a *quietus* entered up of record, could have conferred a good title as against the Crown. But the harshness of the law has been mitigated by recent enactments (2 Geo. 4, c. 121 ; 2 Vict. c. 11 ; 7 & 8 Vict. c. 90), under which a purchaser or mortgagee will not now be affected by Crown debts, unless they are duly registered in pursuance of the statute 2 Vict. c. 11, s. 8. The same statute also directs that it shall be lawful for the commissioners of the Treasury, upon payment of such sums of money as they may think fit into the receipt of her Majesty's Exchequer, by writing under their hands, to certify that the lands of any Crown debtor shall be held by the purchaser or mortgagee thereof, exonerated from all claims by the Crown. (Sec. 10.)

Trust estates are liable to Crown debts in like manner as legal estates. (*Rex v. Smith*, McClell. 417.) It seems, also, that estates *pur autre vie* are bound in the same manner as estates of inheritance (Comb, 291 ; Man. Exch. 541 ; 3 Prest. Abs. 309) ; but it appears doubtful whether copyhold or customary estates are bound at all ; and leasehold estates, it is quite clear, are only bound from the teste of the writ of extent ; so that a sale of property of that description completed previously will be valid even as against the Crown. (*Drury v. Mann*, 1 Atk. 96 ; *Aldrich v. Cooper*, 8 Ves. 394.) This lien of the Crown extends only to the lands of receivers or public officers being immediate accountants to the Crown, and their sureties ; and therefore a simple contract debt due to the Crown will not bind the land of the debtor in the hands of a *bonâ fide* purchaser, who, without fraud or covin, buys from a

simple-contract debtor of the Crown. (*Rex v. Smith*, Wight. 34.) Neither is the collector of assessed taxes of a parish, though liable, to an immediate extent a collector or receiver of money for the use of the Crown within the statute of 13 Eliz. c. 4, s. 1; for he is not appointed by the Crown; he is not a servant of the Crown; he is appointed by other persons: neither does he give security to the Crown; the security he gives is to other persons; he is therefore merely an ordinary simple-contract debtor, and no further subject to the process of the Crown than every one who has, *quocunque modo*, money of the Crown in his hands. (*Casberd v. Ward*, 6 Pri. 411.)

Judgments.—Judgments were formerly no more than a general lien upon the lands (13 Edw. 1, stat. 3), of which only one undivided moiety could have been taken under an *elegit* (*Fenny v. Durant*, 1 B. & A. 40), and did not affect copyhold estates. (*Cannon v. Pack*, 2 Eq. Ca. Abr. 226, pl. 6; Vin. Abr. tit. "Copyhold" (O. E.); *Drury v. Mann*, 1 Atk. 95; *Rex v. Lisle* (Lord), Park, 195; *Morris v. Jones*, 2 B. & C. 432.) But now, by the statute 1 & 2 Vict. c. 110, judgments are made to operate as an actual charge on the lands (s. 13); the sheriff under a writ of *elegit* is now empowered to deliver the whole instead of a moiety; and the right of execution is extended so far as to take in and comprehend all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands of *copyhold or customary tenure*, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at

the time of entering up of such judgment, or at any time afterwards, or over which the person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the sheriff might then make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* was sued out. With respect to copyholds, however, there is a proviso, that such party suing out execution, and to whom any copyhold or customary lands should be delivered in execution, should be liable to render to the lord of the manor, or other person entitled, all such payments and services as the person against whom such execution shall have issued would have been bound to render in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied. And with a further proviso, that as against purchasers, mortgagees, and creditors, who shall become such before the time appointed for the commencement of this Act, such writ of *elegit* would have no other or greater effect than a writ of *elegit* would have had in case the Act had not passed. (Sec. 11.) Nor will a judgment, although duly registered, be binding on purchasers beyond the term of five years from the date of the entry thereof, unless a like memorandum or minute,

as was required in the first instance, is again left with the senior master of the Court of Common Pleas within five years before the execution of the conveyance to the purchaser. (Sec. 4.)

Judgment by tenant in tail, how far binding.—

A judgment by a tenant in tail will now be binding, not only on the issue in tail, but on the remainderman also, where the tenant in tail could have barred the entail without the consent of the protector of the settlement.

Statutes and recognizances.—Under statutes merchant, statutes staple, and recognizances to individuals, the lands and body, and leases and chattels, may be seized and taken in execution, and will become an actual charge upon the land. Formerly the enrolment or docketing of recognizances, as required by the Statute of Frauds, 29 Car. 2, c. 3, s. 18, and other subsequent enactments (5 Anne, c. 18; 6 Anne, c. 35; 7 Anne, c. 20; 8 Geo. 1, c. 25; 8 Geo. 2, c. 6), to render them binding on a *bond fide* purchaser, were unnecessary in the case of recognizances on account of the Crown, and of obligations in the nature and of the quality of statute staple. But now, by the statute 2 Vict. c. 11, no judgment, statute, or recognizance which shall thereafter be entered in the name of her Majesty, shall affect purchasers, unless duly registered in pursuance of the directions of that Act. (Cross on Lien, 127.)

Decrees.—Decrees and orders of courts of equity, and all orders of the Lord Chancellor, or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of

lunacy, whereby any sum or sums of money or costs shall be payable, will have the operation and effect of a judgment, and be binding on purchasers accordingly. (1 & 2 Vict. c. 110, ss. 18, 19.)

Lis pendens.—A person who purchased whilst a suit was pending concerning the property, was supposed, in law, to have constructive notice of it, and therefore bound by the consequences. (*Preston v. Tubbin*, 1 Vern. 392; *Worsley v. Scarborough (Earl of)*, 3 Atk. 392.) There was one exception, however, to this rule, which was in the case of a third mortgagee, who, during the pendency of a suit, was permitted to gain priority over a second mortgagee, by obtaining a legal estate of a first mortgagee. (*Robinson v. Davison*, 1 Bro. C. C. 63; 3 Prest. Abs. 356.) But now, under the recent stat. 2 Vict. c. 11, purchasers will not be affected by any *lis pendens*, unless a memorandum of such suit is duly registered in pursuance of that Act. (Sec. 7.)

Debts.—Debts when charged on real estate are incumbrances, and a purchaser should be satisfied that they are discharged before he accepts the title. Where, however, lands are charged with the payment of debts generally, without any mention being made of the persons to whom such debts are due, the purchaser is, from necessity and general convenience, exempt from the obligation of seeing that they are discharged. (*Elliott v. Merryman*, Barn. 78; *Walker v. Smallwood*, Ambl. 676; *Walker v. Flamstead*, 2 Kenyon, pt. 2, p. 57; *Doran v. Wiltshire*, 3 Swanst. 1699; *Williamson v. Curtis*, 3 Bro. C. C. 96; *Bailey v. Ekins*, 7 Ves. 323; *Balfour v. Welland*, 16 ib. 151; *Shaw v. Borrer*, 1 Keen, 559;

and see 3 Prest. Abs. 360.) But it is otherwise if the debts and creditors are ascertained, or the debts are scheduled, or there has been a decree; in either of such cases it will become the duty of the purchaser to see that all the charges are duly satisfied, otherwise he must be content to take the lands burdened with them. (*Dunch v. Kent*, 1 Vern. 260; *Spalding v. Shalmer*, ib. 301; *Abbot v. Gibbs*, Eq. Ca. Abr. 358, pl. 2; *Elliott v. Merryman*, Barnardist. 78, 81.) Except, indeed, in those instances in which he is, from the nature of the trusts, or, as now generally happens, by an express provision in a deed, will, or Act of Parliament, exempted from the obligation of applying his purchase-money in the payment of the debts. Nor does the rule above laid down affect leasehold estates sold by executors or administrators in that character, they being intrusted by law with the power of sale for the purpose of raising money for payment of creditors; and a purchaser from such personal representatives is not bound to interfere in the application of the money beyond the discharge of those incumbrances which exist independently of the will as mortgages or the like, &c. (3 Prest. Abs. 259, 260; 1 Inst. 290.) Nor will it be necessary where real estate is devised for the payment of debts, that the purchaser should inquire whether more is sold than is sufficient for that purpose; for if this be done, it will not be allowed to turn to the prejudice of the purchaser, for he is not bound to enter into the account; and the trustees cannot sell just so much as is sufficient to pay the debts. (*Spalding v. Shalmer*, 1 Vern. 301, 304.)

Distinction between charges for payment of debts and legacies, and charges for legacies only.—It must be remembered also that there is a distinction between charges for debts and legacies, and charges of legacies only on devised estates; for in the former instance, as we have already seen, a purchaser is discharged from seeing his money applied either in discharge of the debts and legacies; but when legacies only are charged upon real estate beneficially devised to a purchaser, who has notice of the will, the legacies will continue in equity to be a charge upon the estate, and the purchaser would be bound to see his purchase-money applied in discharge of them. (*Drapers' Company v. Yardley*, 2 Vern. 662; *Smith v. Atterley*, 2 Freem. 136; *Tourville v. Naish*, 3 P. Wms. 307; *Tompkins v. Tompkins*, Pre. Cha. 399; *Wigg v. Wigg*, 1 Atk. 384; *Manning v. Herbert*, Ambl. 575; *Horn v. Horn*, 2 Sim. & Stu. 438; *Rogers v. Rogers*, 6 Sim. 364.) But where a will creating a trust or power to sell authorizes the trustees to give receipts for the purchase-money, the purchaser will be discharged from all responsibility respecting it, and will be in nowise bound to see that it is properly applied. And even where there is no power to give receipts annexed to the trusts for sale, still if the time of sale is arrived, and some of the *cestui que trusts* are infants, and as such incapable of signing receipts, the receipts of the trustees will be a sufficient discharge. (*Sowarsby v. Lacy*, 4 Madd. 142.) And in *Lavender v. Stanton* (6 Madd. 46), Sir J. Leach observed, that the power of giving a discharge must necessarily be implied in a case of

this kind, because of the children being incapable of joining in the receipts ; otherwise the power of sale would be nugatory.

Purchaser from heir, whether bound by debts of ancestor.—A purchaser, who buys of an heir or devisee, is not bound by the specialty debts of the ancestor or testator, unless he had notice of them, notwithstanding the heir himself would undoubtedly have been so ; and although a distinction has been contended for between purchasing from a devisee and an heir, and it has been contended that it was only in the latter case a purchaser would be so protected (*Mathews v. Jones*, 2 Anstr. 506), the distinction cannot be supported, for a *bond fide* purchaser for valuable consideration is as much entitled to protection when purchasing from the one as from the other. It has also been determined that, neither by the common law, nor under the statutes 3 & 4 Wm. & M. c. 14, and 47 Geo. 3, c. 74, are the real assets descended or devised charged with the debts of the ancestor or testator. What those Acts effect is, to render the heir or devisee personally liable to answer the value of the assets. (*Timbrel v. Timbrel*, 8 Sim. 253.) And the like rule holds with respect to estates rendered liable to simple contract, as well as to specialty debts under the recent enactment 3 & 4 Wm. 4, c. 104. The payment of a legacy has been considered as good proof of the payment of debts ; but this seems to be laying down the rule rather too broadly ; for such payment amounts to presumptive evidence only, and is open to be rebutted by shewing that debts actually exist.

Legacies.—When legacies are charged on real estate, the purchaser should be satisfied not only that they have been paid, but also that the lands have been exonerated from the charge by the legatees. Where, however, there is a general charge of debts and legacies, and the debts are to be paid, either in terms or by construction, prior to the legacies, then as the purchaser is not obliged to see his purchase-money applied in payment of the debts, he is in like manner released from seeing it applied in payment of the legacies. (3 Prest. Abs. 361; *Walker v. Smallwood*, Ambl. 676; *Williamson v. Curtis*, 3 Bro. C. C. 96; *Walker v. Flamstead*, 2 Keny. pt. 2, p. 57; *Newell v. Ward*, Nels. 38; see also Ram. on Assets, 93.) Mr. Preston, however, suggests that there seems to be one exception, or at least a case calling for caution, and imposing on a purchaser the obligation, or, at any rate, the prudence, of seeing to the application of his purchase-money. This, he continues to observe, occurs when the purchaser has full, clear, and distinct knowledge, by admission or from circumstances, that all the debts have been paid, and that the legacies are the only remaining incumbrances. (3 Prest. Abs. 361.) So if there be a charge of certain specific sums, as 3,000*l.* for A. and 5,000*l.* for B.; and then the surplus, after payment of these legacies, is made a fund for the payment of debts, and subject thereto, the residue is given to the devisee, it will be incumbent on the purchaser, notwithstanding the charge of debts, to have the sums of 3,000*l.* and 5,000*l.* paid to the legatees of those sums. (*Foulkes v.*

Gorwyn, Dec. 1818, cited 3 Prest. Abs. 363; and see *Braithwaite v. Britain*, 1 Keen, 206.)

Portions.—The above remarks respecting legacies are equally applicable to portions charged on real estate. One main cause of difficulty which often occurs with respect to incumbrances of the latter kind, is the absence of any release or other satisfactory proof of their having been paid, or of releases having been taken from incompetent parties, as infants, or persons who were not duly qualified, as executors of an executor who had never proved the testator's will. Circumstances of this kind have often caused considerable difficulty, and it becomes necessary to consider whether circumstances afford a presumption of their discharge by the lapse of time without claim,—a presumption which is now greatly strengthened by the new Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 28, which prohibits any proceedings for the recovery of any money charged upon land after twenty years, unless in the meantime some part of the money, either principal or interest, shall have been paid, or a written acknowledgment given. (*Paget v. Foley*, 2 Bing. N.C. 365.)

Lien.—We have already seen (see *antè*, vol. i. p. 98) that a vendor has in equity a lien on the property sold, for the whole or for any part of the unpaid purchase-money, which will also be binding on a third party who purchases with a knowledge of these facts (2 Stor. on Eq. 456; Cross on Lien, 89; *Hearle v. Boteler*, Cary, Cha. Rep. 25; *Walker v. Prestwick*, 2 Ves. sen. 622; *Gibbons v. Baddall*,

2 Eq. Ca. Abr. 632; *Elliott v. Edwards*, 3 Bos. & Pull. 181; *Macreth v. Symmonds*, 15 Ves. 329); but it will not affect a person who purchases *bond fide* without such notice; nor will a mere deduction of the title to the estate from the first vendor by recital, in anywise affect him, for there was nothing in that to shew that the consideration-money was not duly paid. (1 Bro. C. C. 302; Cross on Lien, 99.)

Outstanding legal estate.—The legal estate being outstanding, is, as I have before remarked, mere matter of conveyance, and will therefore form no objection to a title, even when vested in an infant or a lunatic, and this notwithstanding the latter has not been so found by inquisition. Several Acts of Parliament were from time to time passed for the purpose of obtaining these objects (7 Anne, c. 19; 5 Geo. 1, (1); 5 Geo. 2, (1); 7 Geo. 4, c. 43), all of which have been repealed by the statute 1 Wm. 4, c. 60. By this last-mentioned statute, the Lord Chancellor, where trustees or mortgagees have become lunatic, is empowered to direct the committees of such persons to convey, in the place of such trustee or mortgagee, to such person and in such manner as the Lord Chancellor shall think proper. (Sec. 3.) And the Lord Chancellor may, even before inquisition, appoint a person to convey. (Sec. 5.) Infant trustees and mortgagees are also empowered to convey by the direction of the Court of Chancery, which conveyances are declared to be as effectual as if the infant trustee or mortgagee had been at the time of making or executing the same of the age of twenty-one years. (Secs. 6, 7.) And where trustees of real estates are out

of the jurisdiction of, or not amenable to, the process of the Court of Chancery, or it shall be uncertain, where there are several trustees, which of them was the survivor, and it shall be uncertain whether the trustee last known to be seised is alive, or if he be known to be dead, it shall not be known who is his heir, or if such trustee seised as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered to him for his execution, then it shall be lawful for the said Court of Chancery to direct any person they may appoint for that purpose in the place of the heir or trustee to convey such land to such person and in such manner as the said Court shall think proper; and every such conveyance shall be as effectual as if the trustee seised as aforesaid, or his heir, had executed the same. (Sec. 8.) And the like powers are also conferred on the Court of Chancery where trustees of leasehold estates are out of the jurisdiction of the Court, or it shall be uncertain whether the trustee last known to have been possessed be living; or if he or his executor shall refuse to convey within twenty days after a proper deed shall be tendered for execution. (Sec. 9.) And husbands of female trustees, and whether they be under disability or not, are to be deemed trustees within the meaning of this Act. (Sec. 19.) It afterwards proceeds to enact that the directions or orders of the Court under the authority of this Act are to be made upon petition. (Sec. 11.) And any committee, infant, or other

person directed by virtue of this Act to make or join in any conveyance, may be compelled by such order to execute the same in like manner as trustees of full age and sound memory and understanding are compellible to convey. (Secs. 13, 20.) This Act is also made to extend to trustees, notwithstanding they may have some beneficial estate or interest in the same subject, or may have some duty as trustees to perform; but in every such case, and in every case of a mortgagee (not being a naked trustee), it shall be in the discretion of the Lord Chancellor, or of the Court, if under the circumstances it shall seem requisite, to direct a bill to be filed to establish the right of the party seeking the conveyance, and not to make the order for such conveyance unless the decree to be made in such cause, or until after such decree, shall have been made. (Sec. 15.)

Representatives of vendors to be trustees.—The statute further enacts that where any land shall have been contracted to be sold, and the vendor shall die, either having received the whole or some part of the purchase-money, or not having received any part thereof, and a specific performance of such contract, either wholly or as far as the same remains to be executed, or as far as the same by reason of the infancy, can be executed, shall have been decreed in the lifetime of the vendor, or after his decease, and where one person shall have purchased an estate in the name of another, but the nominal purchaser shall, on the face of the conveyance, appear to be the real purchaser, and there shall be no declaration of trust from him, and a decree of the said Court, either before

or after the death of such nominal purchaser, shall have declared such nominal purchaser to be a trustee for the real purchaser, then and in every such case the heir of such vendor, or such nominal purchaser or his heir in whom the premises shall be vested, shall be and be deemed to be a trustee for the purchaser within the meaning of the Act. (Sec. 16.)

It also further enacts that tenants for life, or other limited interest of estates devised in settlement and contracted to be sold, may be directed to convey after a decree for specific performance. (Sec. 17.)

The provisions of the Act are also made to extend to constructive trusts, or trusts arising or resulting by implication of law ; but in every such case, where the trustee claims a beneficial interest adversely to the party seeking a conveyance, no order shall be made for his executing the same until it has been declared by the Court of Chancery, in a suit regularly instituted, that such person is a trustee for the person seeking the conveyance. It is, however, provided that this Act shall not extend to cases upon partition, or cases arising out of the doctrine of election in equity, or to a vendor, except in any case therein before expressly provided for. (Sec. 18.)

Costs of petition, by whom defrayed.—The costs of petitions, orders, directions, and conveyances under this Act may be ordered to be paid out of the property (sec. 25), and will fall on the party, or those claiming under him, through whose laches these costs have been incurred ; but the purchaser must be at the other costs of the conveyance. (*Prytharch v. Havard*, 6 Sim. 9 ; *Midland Coun-*

ties Railway Company v. Westcomb, 11 Sim. 57 ; Mac. Law of Inf. 439.)

Act not applicabe to mortgagees and their heirs.

—The above-mentioned Act did not apply to mortgagees or their heirs ; but this evil was considered to be remedied by the statute 3 & 4 Wm. 4, c. 23, which abolished escheats and forfeitures of trustees and mortgagees, except to the extent of any beneficial interest, and which was also considered to enlarge the previous statute 1 Wm. 4, c. 60, so as to bring the heirs of mortgagees within its operation. (*Re Stanley*, 7 Sim. 170 ; *Ex parte Whiston*, 1 Keen, 278.) Still the point seems to have been a doubtful one (see Mac. on Inf. 443), to obviate which the Act 1 & 2 Vict. c. 69, was passed ; by which it is provided that where any mortgagee shall have died *without having been in possession of the land, or in the receipt of the rents and profits thereof*, and the money due in respect of such mortgage shall have been or shall be paid to his executor or administrator, and the devisee or heir, or other real representative of any of the devisees or heirs, or real representatives of such mortgagee, shall be out of the jurisdiction, or not amenable to the process of the Court, or it shall be uncertain, where there were several devisees or representatives, who were joint tenants, which of them was the survivor, or it shall be uncertain whether any such devisee or heir or representative be living or dead, or, if known to be dead, it shall not be known who was his heir, or where such mortgagee or any such heir or representative shall have died without an heir, or in

case of neglect to convey, &c. the Court may appoint a person to convey in like manner as by the Act 1 Wm. 4, c. 60, the Court is empowered in the place of a trustee or the heir of a trustee. (Sec. 1.) The third section, however, provides that the Acts 1 Wm. 4, c. 60, and 4 & 5 Wm. 4, c. 23, or either of them, should not be construed to extend to the case of any person dying seised of any land by way of mortgage, other than such as were therein before expressly provided for. (Sec. 3.)

Under these two last-mentioned statutes, an infant is only compelled to convey such estates as he takes in the character of a trustee; but under a prior enactment (1 Wm. 4, c. 47), he may, under certain circumstances, be compelled to convey his own interest. This occurs where there has been a decree for the sale of lands for the satisfaction of debts, and an immediate conveyance could not have been effected on account of an infant heir or devisee of such lands; in which case the Court in which such decree is obtained is empowered to compel the infant to convey such estates so to be sold, to the purchaser in such manner as the said Court shall direct; and every such conveyance shall be as valid as if the infant were of full age at the time of executing the same. It then proceeds to enact that where any lands, liable to the payment of debts, shall be devised in settlement, and by such devise shall be vested in any person for life or other limited interest, with any remainder over which may not be vested, or may be vested in some other person or persons from whom a conveyance or other assurance of the same cannot be obtained,

or by way of executory devise, and a decree shall be made for the sale thereof for the payment of debts, it shall be lawful for the Court that made such a decree, to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey the fee-simple, or other the whole interest so sold, to the purchaser, in such manner as the said Court should think proper ; and every such conveyance is thereby declared to be as effectual as if the person who should execute the same were seised in fee-simple. (Sec. 12.)

Equitable tenant for life not within this statute.

—There is, however, a very important omission in this Act, which seems to have been lost sight of by the framers of it, and which can only be remedied by the Legislature. The Act is altogether silent about persons who take equitable life estates, or other limited interests of that kind ; from whence it necessarily follows, that these are not such persons taking such a limited interest under the 12th section of that Act as would authorize the Court to direct them to convey to a purchaser, under a decree to sell for the payment of debts. (*Hemming v. Archer*, 5 L.T. 281.) And where in such case the devisee in trust *pur autre vie* disclaims, whereby the trust estate descends to the heir-at-law, the Court has no power under the 12th section of the Act. And notwithstanding that infants taking by way of executory devise are, as we have already seen, empowered to convey, by the 11th section, still where such infants are the children of a living

person, they are disabled from so doing, for there may be more children born, and they have not therefore the whole interest in them. (*Ib.*) See also *Gwyne v. Thomas* (6 L.T: 127).

SECTION II.

OF THE PROTECTION AGAINST PRIOR AND INTER-
MEDIATE ESTATES AND INCUMBRANCES.

1. *Protection at Law.*
2. *Protection in Equity.*
3. *Notice.*

 1. *Protection at Law.*

THERE are certain instances in which courts of law, acting concurrently with courts of equity, will relieve a purchaser for valuable consideration against former conveyances by which his title is affected. Thus a voluntary settlement, however free from actual fraud, is, by the statute of 27 Eliz. c. 4, rendered fraudulent and void against a subsequent *bonâ fide* purchaser for valuable consideration at law as well as in equity, and this even where such purchaser buys with full notice of the settlement. (*Gooch's case*, 5 Co. 60; *Tonkins v. Ennis*, 1 Eq. Ca. Abr. 334, pl. 6; *Leach v. Dean*, 1 Cha. Rep. 78; *Evelyn v. Templer*, 2 Bro. C. C. 148; and see 1 Fonbl. Eq. 281.) The operation of this statute extends as well to copyholds as to freeholds. (*Doe v. Bottriell*, 5 B. & A. 131; *Currie v. Nind*, 1 Myl. & Cr. 580.) And even a conveyance for the payment of debts to which no creditor is a party, nor any particular debts specified, is consi-

dered as a fraudulent conveyance within the above statute as against subsequent *bond fide* purchasers. (*Upton v. Bassett*, Cro. Eliz. 444; *Needham v. Beaumont*, 3 Rep. 83, n. b; *Doe v. Routledge*, Cow. 708; *Bullock v. Sadleir*, Ambl. 764; *Hill v. Exeter (Bishop of)*, 2 Taunt. 69; *Doe v. James*, 16 East, 212; *Doe v. Rowe*, 4 Bing. N. C. 737; 1 Ves. & B. 184.) It seems doubtful, however, whether a purchaser who had actual notice of the trust would be relieved against a conveyance of this kind; at any rate, it is sufficiently questionable to render it imprudent for any purchaser to take a title so circumstanced. (*Langton v. Tracey*, 2 Cha. Rep. 16; *Stephenson v. Hayward*, Pre. Cha. 310.) And notwithstanding the protection the statute affords to a purchaser, it does not confer such a title on the vendor as will enable him to compel an unwilling purchaser to accept it (*Smith v. Garland*, 3 Mer. 123); though the latter has it in his power to compel the vendor to a specific performance (*Buckle v. Mitchell*, 18 Ves. 101; *Metcalf v. Pulvertoft*, 1 Ves. & B. 180); the principle of the Act being, to protect purchasers, and not to empower vendors to break through *bond fide* settlements, although arising from their own voluntary act, and without consideration.

Charitable uses.—A purchaser is also protected, at law as well as in equity, against charitable uses, by the stat. 43 Eliz. c. 3, which enacts, that no *bond fide* purchaser of lands, for valuable consideration, of lands, &c. that shall be given to any of the charitable uses mentioned in that Act, without fraud or covin, *having no notice of the same charitable*

uses, shall be impeached by the decrees of the commissioners therein mentioned. The protection afforded to purchasers by this latter statute is not, we see, quite so extensive as that conferred by the former one (27 Eliz. c. 4); for there he is entitled to protection even with notice, but in the latter instance he is not. And should he therefore purchase with such notice, it seems that no length of possession will make his title good. (*The Attorney-General v. Christ's Hospital*, 3 Myl. & Kee. 344.) Nor will it be sufficient to bring a case within the protection of the latter statute, that the purchaser has paid a valuable consideration for the property. To support his title, he must be enabled to shew that he has given an adequate consideration; but it seems that any consideration which exceeds half the value of the land will be so considered. (*Baldwin v. Rochfort*, 2 Ves. 215, cited.) And even if the consideration does not come up to half the value of the land, although this would afford ground for impeaching the sale to the immediate purchaser, still if he were to sell to another upon good consideration *bonâ fide*, without notice, the title of the latter would be unimpeachable. But if he had notice, then it seems that all who claim in privity of estate under him, would be bound by it. (*East Grinstead case*, Duke, 64, 173.)

Defects in sales for the land-tax. Defects in sales for the redemption of the land-tax.—Inconveniences having sometimes arisen where lands had been sold for the redemption of the land-tax under the statute 42 Geo. 3, c. 116, by reason of such sales having often been made by persons not having

an absolute estate and interest in the property, the statute of 54 Geo. 3, c. 173, was passed, by which all such conveyances were confirmed from the respective periods at which such sales and conveyances were respectively made and executed (sec. 12); but, at the same time, persons injured or prejudiced by such sale so confirmed, were to be entitled to relief in equity, and, by decree or order of such Court, to receive compensation by a rent-charge, to be issuing out of the lands for such term or estate as the Court should direct. (Sec. 13.) Difficulties however, again arose, on account of such conveyances not having been executed by the commissioners under the sign-manual, as required by the terms of the Act, and also as to the mode of confirming titles under such imperfect conveyances; to remedy which, Commissioners for the Affairs of Taxes, or any two of them, are, by a subsequent statute (57 Geo. 3, c. 100—on their being satisfied that such deeds, &c. would have been authorized and available under the provisions of the said Acts, if the commissioners under those Acts had executed the same), enabled to sign and seal such deeds, &c. and to cause such indorsements to be made thereon as they may think necessary for shewing their assent and confirmation thereto; and all such deeds, &c. so signed and sealed and indorsed, are thereby declared to be confirmed from the respective periods at which they were originally designed to take effect, and without any additional stamp-duty being required in respect of such confirmation. (Sec. 22.) The Commissioners for the Affairs of Taxes are also empowered to rescind any contract for the sale of any

land for the redemption of the land-tax, whenever such contract cannot be completed by reason of some defect in the title. (Sec. 33.) It also further enacts, that all deeds required by the said Acts to be enrolled shall be valid, although not enrolled within the period prescribed by the Acts relating to the redemption of the land-tax; and that it shall be lawful for any two or more of the Commissioners for the time being for the Redemption of the Land-tax, if they shall think fit, upon the production of any such deeds, to order the same to be enrolled or registered, which are thereby to become as valid as if the same had been enrolled within the periods prescribed by the said Acts; and that all conveyances made subsequent to any deeds already enrolled or registered, or to be registered, under that Act, and depending in point of title on such deeds, should be of the same effect as if such deeds had been enrolled or registered on the day of the date thereof; nevertheless, without prejudice to the validity of any assurance to correct or supply any defects arising from the want of such enrolment or registry. (Sec. 24.) It further enacts that all sales and conveyances of lands for the purpose of redeeming the land-tax, provided such conveyances shall appear to have been executed under the authority and with the consent and approbation of the respective commissioners, shall be thereby confirmed from the respective periods at which such sales and conveyances were respectively made and executed. (Sec. 25.) And with a proviso for relief in equity for persons injured by such sales within five years, if not labouring under dis-

ability ; and if so labouring, then within five years after the removal of the same. (Sec. 26.)

Protection from acts of bankruptcy.—All dispositions of his property by a trader after committing an act of bankruptcy were, as we have already seen (vol. i. p. 164), void, under the statute 13 Eliz. c. 7. By the 21 Jac. 1, c. 15, s. 1, purchasers for valuable consideration were protected unless a commission issued within five years after the act of bankruptcy. The Act 46 Geo. 3, c. 135, rendered all *bonâ fide* transactions with a bankrupt valid, if entered into more than two years before the date of his commission, notwithstanding a prior act of bankruptcy, unless the purchaser had notice of it. By a still more recent enactment (6 Geo. 4, c. 16), all *bonâ fide* conveyances by a bankrupt entered into more than two calendar months before the issuing of the commission, were declared valid, notwithstanding a prior act of bankruptcy, unless the purchaser had notice of it (sec. 81) ; and even if he had such notice, the sale was not to be impeached unless a commission or fiat was sued out within twelve months after the act of bankruptcy, instead of two years, as the law stood previously. (Sec. 86.) And the recent statute, 2 Vict. c. 11, after reciting that it was expedient that further provision should be made for the protection of purchasers against secret acts of bankruptcy and fiats in bankruptcy, enacts that all conveyances by any bankrupt, *bonâ fide* made and executed before the date and issuing of the fiat against such bankrupt, shall be valid, notwithstanding any prior act of bankruptcy by him committed ; provided the person or persons

to whom such bankrupt so conveyed had not, at the time of such conveyance, notice of any prior act of bankruptcy by him committed. (Sec. 12.) And it further enacts, that no purchase from any bankrupt *bond fide* and for valuable consideration, where the purchaser had notice, at the time of such purchase, of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy. (Sec. 13.)

Judgments.—By statute 1 & 2 Vict. c. 110, no judgment or decree, or any order in bankruptcy or lunacy, shall affect purchasers, unless registered in pursuance of the terms of that Act. (Sec. 19.) And by the stat. 2 Vict. c. 11, judgments are, as we have already seen, to be void after five years, unless a like memorandum as was required in the first instance is again left with the senior master of the Common Pleas, and so *toties quoties* at the expiration of every succeeding five years. (Sec. 4.)

Lis pendens.—The last-mentioned statute also directs that no *lis pendens* shall bind a purchaser without express notice thereof, unless such suit is duly registered as thereby is directed. (Sec. 7.)

Crown debts.—It also enacts that no judgment, statute, or recognizance, which should thereafter be obtained or entered into upon account of the Crown, or inquisition by which any debt shall be found due to her Majesty, her heirs or successors, should affect purchasers unless duly registered in the manner thereby prescribed. (Sec. 8.)

Protection from unregistered deeds.—In certain

parts of the kingdom all deeds and wills are required, by Act of Parliament, to be registered (2 & 3 Anne, c. 4; 5 Anne, c. 18; 6 Anne, c. 35; 7 Anne, c. 20; 8 Geo. 2, c. 6); and where this occurs, all deeds and wills, unless registered accordingly, are declared to be fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration. But as on the one hand a subsequent purchaser is protected against an unregistered document, so on the other, where the title depends upon one that is already registered, he must be careful to ascertain, not only that this be done, but also that the registry be made in pursuance of the terms of the particular Act of Parliament prescribing it. And notwithstanding an appointment when made is considered to relate to, and to operate in the same manner as if contained in the deed creating the power, still for this, an unregistered appointment will be ineffectual against a subsequently registered deed, it being considered as falling within the mischiefs the Registry Acts were intended to guard against. (*Scrafton v. Quincey*, 2 Ves. sen. 413.) But copyhold lands need not be registered, nor leases at rack-rent; nor leases not exceeding twenty-one years, where the possession goes along with it.

Defective fines and recoveries.—Many titles having proved defective in consequence of the negligence of persons employed in suffering recoveries, the statute of the 14 Geo. 2, c. 20, was passed, by which it was enacted, that a purchaser, having been twenty years in possession, might, at the end of that time, produce in evidence the deed making the

tenant to the *præcipe*, and declaring the uses of the recovery, which was to be deemed good evidence that the recovery was duly suffered, in case no record of the recovery could be found, or it was entered irregularly on the record. And it was also provided, that all recoveries should be deemed good after twenty years, where it appeared that there was a tenant to the writ, and the persons joining in the same had a sufficient estate and power to suffer the recovery, notwithstanding the deed making the tenant to the *præcipe* might be lost. (Sec. 5.) Other inconveniences, however, also arose upon titles depending on fines and recoveries, in consequence of their having been levied or suffered in wrong courts, as in the superior courts, for example, where the lands were of ancient demesne. These defects are now remedied by the recent Fine and Recovery Substitution Act, 3 & 4 Wm. 4, c. 74, which removes the existing inconveniences resulting to the parties from their mistakes in having suffered fines or recoveries under wrong jurisdictions. (Secs. 4, 5, 6.) It also does away with the necessity of the amendment of fines or recoveries for errors in names or in misdescription of parcels (secs. 7, 8; and see *Lockington's case*, 1 Bing. N. C. 355); whilst it saves the jurisdiction of the courts in other cases. (Sec. 9.) It also renders recoveries valid where a deed of bargain and sale has not been duly enrolled, or the legal estate has been left outstanding. (Secs. 10, 11.) It also provides that a voidable estate by a tenant in tail in favour of a purchaser for valuable consideration, shall be confirmed by a subsequent disposition by the tenant

in tail under that Act, but not as against a purchaser without notice. (Sec. 38.) It was indeed enacted by a previous statute (3 & 4 Wm. 4, c. 27, s. 23), that where there shall have been possession under an assurance by a tenant in tail which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them. A doubt has, however, arisen as to whether this clause of the Act applies to fines and recoveries. Mr. Browell, in his edition of the Real Property Statutes (p. 41), observes, that one learned gentleman considers this Act has no such application, because a fine would not at that period have barred the remainders, nor could a recovery have any new operation; for that assurance could not now be made at all, and the terms of the section require that such assurance, *if then executed*, would have operated to bar such estates. The words also, "without the consent," he adds, apply only to the protectorship introduced by the new Act. And, further, the Fines and Recoveries Act makes good defective fines and recoveries where such was the intention, and gives confirmation in certain cases in express words to voidable estates *already created*, or thereafter to be created, by a tenant in tail. Mr. Hayes, on the contrary, states that the provision does apply to the old system of common recoveries, and on that hypothesis suggests some cases in which the construction of the clause would be open to doubt. (Hayes's Conv. 234.) And Mr. Browell himself expresses his opinion "that the language of the enactment is certainly not, in strict-

ness, applicable to recoveries, but that it may be doubted whether there is sufficient to exclude these assurances from its operation. The argument derived from the words of the section requiring that the assurance must have operated to bar the remainders, if executed at the time when the power to do so first accrued, seems only to shew that if that event happened after recoveries were abolished, the provision cannot apply to them. Even to that extent the exclusion of recoveries seems doubted." Amidst such uncertainty and diversity of opinions it is almost needless to say that no title upon which a question of this kind arises can be considered as marketable. But such defect, except as against a subsequent purchaser without notice, might be cured by a subsequent disposition by the person who, but for such conveyance, would have been tenant in tail, if there is no protector of the settlement; but if there be such protector, who shall not consent to the disposition, and the tenant in tail shall not, without such consent, be capable of confirming the voidable estate to its full extent, then, and in such case, such disposition shall have the effect of confirming such voidable estate, so far as such tenant in tail would then be capable of confirming the same without such consent. (Sec. 38.) And by the 47th section of the same statute, any commissioner acting in the execution of a fiat in bankruptcy, in case of a tenant in tail entitled to a base-fee becoming bankrupt, is enabled to dispose of such lands to a purchaser for valuable consideration, provided, at the time of such disposition, there be no protector of the settlement by which the estate tail converted into a base-fee

was created; and by such disposition the base-fee shall be enlarged into as large an estate as the same could, at the time of such disposition, have been enlarged into by the person so entitled, if he had not become bankrupt.

2. Protection in Equity.

Defective assurances.—A purchaser for valuable consideration without notice has always been considered as entitled to the protection of a court of equity, which will supply any defects of circumstances in conveyances; such as livery of seisin in the passing of a freehold (Fran. Max. 55; *Brockenham v. Brockenham*, 1 Cha. Cas. 240; *Thompson v. Atfield*, 2 Cha. Rep. 112; *Jackson v. Jackson*, Sel. Cas. Cha. 81), or, as we have already seen (*antè*, p. 151, *et seq.*), of a surrender of copyholds. Equity will also relieve against a defective execution of a power, but not where the power is never executed at all; the rule being that the non-execution of a power cannot be supplied, though a defective execution may. (*Tollett v. Tollett*, 2. P. Wms. 490; *Holmes v. Coghill*, 7 Ves. 499; 12 ib. 206; *Hixon v. Oliver*, 13 Ves. 114.) And notwithstanding equity will supply defects in a conveyance, even as against a subsequent purchaser, *if he buys with notice*, still this aid does not extend to the supplying of any circumstance for the want of which the Legislature has declared the instrument to be void (*Hibbert v. Rolleston*, 3 Bro. C. C. 751; *Williams v. Bolton (Duke of)*, 2 Ves. 128; *Ex parte Bulleal*, 1 Cox, 243); unless, perhaps, where, by accident or

fraud, the party be prevented from completing the instrument, as prescribed by law. (1 Fonbl. Eq. 38, n. t.) Neither does this remedial power of courts of equity extend to the case of a defective fine, as against the issue; nor of a defective recovery, as against the remainder-man. (*Ib.*)

Vendor, how far bound to perfect an imperfect assurance.—Where a vendor has a good title, but executes an imperfect conveyance to a purchaser, not only will he himself be bound to perfect the assurance, but this equity will attach upon and be binding on his heir also. (*Taylor v. Wheeler*, 2 Vern. 564; *Jennings v. Moore*, *ib.* 609; *Martin v. Seamore*, 1 Cas. in Chan. 170.) Yet, no such equity attaches on the heir, where a vendor, *having a defective title*, conveys to a purchaser, and afterwards a good title devolves upon him. Still, although the vendor himself would have been bound to make good the conveyance, it is nothing more than a personal equity attaching upon the conscience of the party, and not descending with the land. (*Forse v. Faulkener*, 1 Anstr. 11; *Carleton v. Leighton*, 3 Mer. 667.) But, although the heir cannot be compelled to confirm the imperfect assurance, still, if he does so, he will be bound by it, even if unaware of the extent of his interest in the property. (*Braybroke (Lord) v. Inskip*, 8 Ves. 417, 431.) For where a purchaser has given a full value for an estate, the mistake or ignorance of some of the parties to the conveyance of their claims upon the property, will not be permitted to prejudice a fair and *bonâ fide* purchaser. (*Malden v. Menhill*, 2 Atk. 8; see also *Can v. Can*, 1 P. Wms. 727; *Stevens v. Bate-*

man (*Lord*), 1 Bro. C. C. 22; *Malcomb v. Charleworth*, 1 Keen, 63; *Sturge v. Storr*, 2 Myl. & Keen, 195.) And if a man who has a title stands by and encourages the purchase, he will be bound by it. (*Hobbs v. Norton*, 1 Vern. 136; *Hunsden v. Cheyney*, 2 ib. 150; *Raw v. Pole*, ib. 239; *Draper v. Borlace*, ib. 370; *Ibbetson v. Rhodes*, ib. 554; *Arnott v. Bigle*, 1 Ves. 95; *Berriaford v. Milward*, 2 Atk. 49; *East-India Company v. Vincent*, ib. 3; *Jackson v. Cator*, 5 Ves. 688; *Burrowes v. Lock*, 10 Ves. 470.) Nor will either infancy or coverture be admitted as an excuse in a transaction of this kind. (*Watts v. Creswell*, and *Clare v. Earl of Bedford*, cited in *Savage v. Foster*, 9 Mod. 33; *Evroy v. Nicholls*, 2 Eq. Ca. Abr. 489; *Becket v. Cordley*, 1 Bro. C. C. 353.) "And this," the learned author of the *Treatise on Equity* observes (lib. 1, c. 3, s. 4), "seems a just punishment for concealing his right, by which an innocent man is drawn to lay out his money." (And see *Syles v. Cooper*, 3 Atk. 692; *Anon. Bunb.* 35; *Henning v. Ferrers*, *Gilb. Rep.* 83; *Fox v. Macreth*, 2 Bro. C. C. 420.)

Dormant incumbrances.—Equity will also relieve a *bond fide* purchaser against dormant incumbrances, such as ancient statutes, of which there is no positive proof of their having been cancelled (*Burgh v. Wolf*, *Toth.* 226; *Smith v. Rosewell*, ib. 247); as also against old mortgages or other incumbrances, which have not been acted upon for a long time, or any demand made in respect of them. (*Abdy v. Loveday*, *Finch*, 250; *Gibson v. Fletcher*, 1 *Cha. Rep.* 32; *Hales v. Hales*, 2 ib. 56;

Whiting v. White, 2 Cox, 290.) And as, on the one hand, equity will raise this presumption in favour of a mortgagor who has been long in possession, so on the other hand where a mortgagee has been in possession for any great length of time, as twenty years or upwards, without paying any interest,—or any other circumstances appearing from which it can be inferred that the mortgage is still subsisting, and the mortgagor cannot set up a sufficient legal disability in excuse for his neglect, the equity of redemption will be wholly barred. (*St. John v. Turner*, 2 Vern. 418; *Trash v. White*, 3 Bro. C.C. 289; *Blewett v. Thomas*, 2 Ves. 669; 1 Fonbl. Eq. 333, n. s.)

Legal estate, how far a protection.—A purchaser for valuable consideration, without notice, was allowed in equity to avail himself of the protection of any outstanding legal estate in support of his title; so that where a purchaser bought up an old statute or mortgage, though nothing was due upon it, he was admitted to defend himself by it. (*Higden v. Calamy*, 21 Car. 2; and *Wymouzel and Hawland*, cited 2 Vern. 158; see also *Stanton v. Sadleir*, ib. 30; *Hitchcock v. Sedgwick*, ib. 156; *Golborn v. Alcock*, 2 Sim. 559.) So, where a purchaser without notice procured the assignment of an outstanding term to a trustee, he was allowed to avail himself of its protection, as a security against all estates, charges, and incumbrances (except Crown debts by specialty) created immediately between the time of granting the term and the period of the purchase. (1 Mad. Pract. 507; *Finch v. Northworthy*, Finch, 102; *Willoughby v. Wil-*

loughby, 1 T. R. 763; *Churchill v. Grove*, Nels. C. R. 91; 1 Saund. Uses, 275.) It would also have afforded a protection against an act of bankruptcy. (*Collet v. De Gols*, For. 65.) The execution of a power of appointment would also have overreached judgments subsequent to the deed creating the power, and would have been binding on the estate, even at law (*Doe v. Jones*, 10 B. & C. 459); and in equity would have protected a purchaser, even with notice. (*Tunstall v. Trappes*, 3 Sim. 286; *Eaton v. Sanxter*, 6 Sim. 517; *Skeeles v. Shearley*, 8 ib. 153; 3 Myl. & Cr. 112.) But in general, if a person purchased an equitable estate, with notice of existing judgments upon the property, no acquisition of the legal estate by the purchaser could have protected him from such incumbrances. (*Tunstall v. Trappes*, 3 Sim. 386.) A mortgagee, therefore, who had notice of judgments, purchasing the equity of redemption, would be bound by such judgments, although they were not entered up until after the mortgage.

Alterations effected by recent enactments.—The recent statutes of the 1 & 2 Vict. c. 10, and of 2 Vict. c. 11, have in some degree narrowed this equitable protection of purchasers; for though the execution of a power will still overreach judgments in favour of a purchaser for valuable consideration without notice (2 Vict. c. 11, s. 2), it will not, as formerly, afford any protection to a purchaser who has notice of the incumbrance; and, notwithstanding a purchaser may still protect himself by obtaining the conveyance of a prior legal estate, or an assignment of an outstanding term

to a trustee for his benefit (sec. 5), still it seems that a legal estate will afford him no protection where, instead of being left outstanding, it is vested in a trustee in trust for the vendor, or an attendant term *has been actually assigned* to a trustee in trust for him; for now, under the recent enactments, judgments, instead of being a mere general security as formerly, are made an actual charge upon the lands, which would be so chargeable in the hands of the vendor, notwithstanding the legal estate was vested in some one else in trust for him; and it seems that a judgment-creditor might follow such lands, even in the hands of a *bond fide* purchaser.

Requisites to equitable protection.—In order also that a purchaser may avail himself of the benefit of an *outstanding* term, he must have paid a valuable consideration. His purchase must have been fair, he must have had no notice, either express or implied, and must have the best right to call for the legal estate of the term. (*Willoughby v. Willoughby*, 1 T. R. 763; see also *Saunders v. Dehew*, 2 Vern. 271; *Robinson v. Davidson*, 1 Bro. C. C. 63; *Jerrard v. Saunders*, 4 ib. 457; *Evans v. Bicknell*, 6 Ves. 184.)

Purchaser, even with notice, may protect himself against dower.—The rule indeed with respect to notice is now applicable to all cases of purchasers intending to avail themselves of the protection of prior legal estates, with the single exception of dower, which it has long been determined a purchaser may protect himself against by obtaining the assignment of an attendant term, notwithstanding he purchases with express notice of the marriage. (*Radnor*

(*Lady*) v. *Rotherham*, Pre. Cha. 65 ; S. C. 1 Vern. 179, by the name of *Bodmin v. Vandebendy* ; S. C. Show. P. C. 69 ; *Brown v. Gibbs*, 1 Vern. 97 ; *Wray v. Williams*, Pre. Cha. 151 ; S. C. 2 Vern. 378 ; 1 Eq. Ca. Abr. 219, pl. 4, but best reported 1 P. Wms. 137 ; *Dudley and Ward v. Dudley*, Pre. Cha. 241 ; Cas. temp. Talb. 140 ; *Baker v. Sutton*, 2 P. Wms. 700, 707 ; *Swannock v. Lydford*, Ambl. 6 ; S. C. by name of *Hill v. Adams*, 2 Atk. 208 ; *Wyns v. Williams*, 5 Ves. 130 ; *D'Arcy v. Blake*, 2 Sch. & Lef. 387.) Still, to obtain this equitable protection as against a widow's title to dower, the term must be actually assigned to a trustee in trust for the purchaser ; for if it be left outstanding, he will not be permitted to avail himself of it. (*Maunderell v. Maunderell*, 7 Ves. 567.) Before dismissing this subject, it may not be improper to make a few remarks upon the operation of the recent enactment, 8 & 9 Viet. with respect to outstanding terms. By this Act, all satisfied terms are to cease on the 31st of December, 1845 ; but it still continues the same protection as before against incumbrances, in those cases where it has been made attendant by express declaration. (Secs. 1, 2.) Still as this protection is restricted to terms attendant by express declaration, and as no such declaration can be made after the 31st of December, 1845, all persons who had not obtained an assignment before that time are wholly debarred of all benefit of such satisfied terms. A learned writer, when treating on this subject, also observes (see *Browell's Real Property Statutes*, 281, n. b), " Before it can be assumed that a term is brought within the

operation of the Act, there must be a full disclosure of the trusts or purposes for which it was created, or to whom it may have become subsequently liable, and the clearest evidence that none of them are subsisting and capable of taking effect. It is obvious that difficulties will frequently arise in satisfying a purchaser upon these points; and whenever he omits to obtain an assignment, he will be liable to have the term used against him in ejectment, and may have the onus cast upon himself of proving that the term is satisfied. Even possession of the deeds relating to the term will not prevail against an actual assignment to a future purchaser without notice; and such purchaser will perhaps be enabled to give a continued and permanent existence to the term, merely by having it assigned upon express trust, to protect him from the afterwards-discovered *mesne* incumbrance. The operation of the statute is similar to that of the old proviso for *cesser*, which," as he truly remarks, "is very rarely relied on in practice, though it might be with less hazard, inasmuch as the proviso specifies the events on which the term is to cease, and there is seldom a difficulty in proving that such events have happened; but much more than this is requisite to satisfy a purchaser that the term has ceased by force of the statute."

How a purchaser should be pleaded.—A purchaser for valuable consideration, in order to avail himself of this equitable protection, must do so by plea and not by answer; for if he does the latter, he will be bound to answer fully (*Richardson v. Mitchell*, Sel. Cas. Cha. 51; *Clanrichard v. Burk*, Vin. Abr.

tit. "Chancery" (W. A.); 2 Atk. 155; *Blacket v. Langlands*, 1 Anstr. 14; *Hughes v. Garth*, 2 Eden, 168; S. C. Ambl. 421; *Ovey v. Leighton*, 2 Sim. & Stu. 234; *Portarlington (Lord) v. Soulby*, 7 Sim. 28; *Trevanion v. Mosse*, 1 Vern. 246)—the plea, in fact, being the cause assigned for not putting in the answer. The plea should state the purchase according to the facts (*Egerton v. Egerton*, 3 P. Wms. 281; *Aston v. Aston*, 3 Atk. 302; *Walwyn v. Lee*, 9 Ves. 32; *Attorney-General v. Backhouse*, 17 Ves. 290; see also 2 Mad. Pract. 322; Rede's Tr. pl. 215), and must set forth an actual conveyance, for a mere agreement to purchase is insufficient (*Heap v. Egerton*, 3 P. Wms. 280); and also aver that the purchase-money was actually paid (*Moor v. Mayhow*, 1 Cha. Cas. 34; *Harrison v. Southcote*, 1 Atk. 538; *Story v. Windsor (Lord)*, 2 ib. 630; *Hardingham v. Nicholls*, 3 ib. 304; *Hardwood v. Tooke*, 2 Mad. Pract. 323), this being absolutely requisite to support it; for if merely secured to be paid, it will be insufficient. (*Ib.*) But the plea will not be bad merely because the sum paid was inadequate to the value of the purchased property. (*Bassett v. Nosworthy*, Finch, 102; *Mildmay v. Mildmay*, Ambl. 767, cited; *Bullock v. Sadleir*, ib.) The plea must also deny notice of the plaintiff's title previously to the completion of the purchase, which notice must be denied in positive terms, and not evasively or equivocally. (*Moor v. Mayhow*, 1 Cha. Cas. 34; *Cason v. Round*, 1 Pre. Cha. 226, n. a; *Ashton v. Curzon*, and *Weston v. Berkeley*, 3 P. Wms. 244; *Attorney-General v. Gower*, 2 Eq. Ca. Abr. 685, pl. 11; *Bodmin (Lady) v. Vande-*

bendy, 1 Vern. 179; *Storey v. Windsor (Lord)*, 2 Atk. 630; *Fitzgerald v. Burk*, ib. 397; *Hughes v. Garner*, 2 You. & Coll. 328.) At the same time, it will be sufficient to deny notice generally (*Ovey v. Leighton*, 2 Sim. & Stu. 234), unless certain facts are stated in the bill as evidence of such notice (*Bennington v. Beechy*, 2 Sim. & Stu. 282; *Thring v. Edgar*, ib. 274); in which case the facts so stated must be denied as specially as they are charged. (*Mader v. Birt*, Gilb. Eq. Rep. 185; *Radford v. Wilson*, 3 Atk. 815; *Foley v. Hill*, 2 Myl. & Cr. 478.)

3. Of Notice.

Our next consideration will be, what will be sufficient notice to preclude a person from all claim to equitable protection?—a question involved in much nicety, depending sometimes on matters of fact, sometimes on matter of law. It may be either positive, as where the knowledge of the fact is brought directly home to the party (1 Stor. Eq. 320); or constructive, as where, from the knowledge of some certain fact or circumstance, he must be presumed also to have a knowledge of other facts or circumstances connected therewith. (*Plumb v. Fluit*, 2 Anstr. 438; *Mertins v. Jolliffe*, Ambl. 311; *Marr v. Bennett*, 2 Cha. Cas. 246.) Thus knowledge of a lease has been held to be constructive notice of its contents. (*Hall v. Smith*, 14 Ves. 426; *Taylor v. Stibbert*, 2 Ves. 440; *Daniels v. Davison*, 16 Ves. 249; *Allen v. Anthony*, 1 Mer. 262.) So notice of a deed, which recites another deed, will be constructive evidence of such latter

deed; nor will a party so presumed to be possessed of knowledge of this kind, be permitted to disprove it by evidence. And this rule has been extended so far as to establish that where a purchaser cannot make out a title but by deed which leads him to another fact, he will be presumed cognizant of that fact (2 Fonbl. Eq. 151): and it has also been holden that whatever is sufficient to put a party upon inquiry, is sufficient notice in equity. (*Ib. n. m*; *Smith v. Law*, 1 Atk. 1; *Mertins v. Jolliffe*, Ambl. 313; *Taylor v. Stibbert*, 2 Ves. 437; *Daniels v. Davison*, 16 ib. 250; *Newman v. Kent*, 1 Mer. 240.) But a purchaser is not bound to take notice of an equity arising out of mere construction of words, which are uncertain (*Cordwell v. Mackrill*, 2 Eden, 347); nor of any matters beyond those which affect his present purchase. (*Mertins v. Jolliffe*, Ambl. 311.) Hence, if a man purchase an estate under a deed which happens to relate also to other lands not comprised in that purchase, and afterwards he purchases the other lands to which an apparent title is made, independent of that deed, the former notice of the deed will not itself affect him in the second transaction; for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about to make, nor to take notice of more of the deed than affected his then purchase. (*Hamilton v. Royal*, 2 Sch. & Lef. 327; 1 Stor. Eq. 321, n. 1.) Neither are vague and indefinite rumours sufficient to put a party upon inquiry. Still, as a celebrated modern writer on equitable jurisprudence observes (1 Stor. Eq. 322), there will be found almost

infinite grades of presumption between such rumour and suspicion, and that certainty as to facts which no mind could hesitate to pronounce enough to call for further inquiry, and to put the party upon his diligence. No general rule, therefore, he proceeds to state, can be laid down to govern such cases. Each must depend upon its own circumstances. (*Hine v. Dod*, 2 Atk. 275; *Eyre v. Dolphin*, 2 Ball & Beat. 301; 2 Fonbl. Eq. 303, n. b.) There is no case which goes the length of saying that the failure of the utmost circumspection shall have the same effect of postponing a party as if he were guilty of fraud or wilful neglect, or he had positive notice (*Plumb v. Fluit*, 2 Anstr. 433, 440); and though a mistake of law upon the construction of a deed or contract will not alone discharge a purchaser from the legal effects of notice of such deed or contract, yet there may be a case of such doubtful equity under the circumstances, that it ought not to be enforced against a purchaser. (*Bovey v. Smith*, 1 Vern. 144, 149; *Walker v. Smallwood*, Ambl. 676; *Cordwill v. Mackrill*, 2 Eden, 344, 348; *Parker v. Brooke*, 9 Ves. 583, 588; 1 Stor. Eq. 322.) Nor will the mere fact of possession of the title-deeds, unless accompanied with some other circumstances, be sufficient to affect a purchaser with notice; but if, in addition to the knowledge that no title-deeds can be produced, he has such information as would induce any one possessing ordinary caution to make further inquiries, which he fails to do, he will be construed to have notice of those facts, which, if he had used ordinary diligence, he

might have informed himself of. (*Whitbread v. Young*, 1 You. & Coll. 303.)

What acts or circumstances will amount to notice.—A public Act of Parliament is said to be public notice to the whole world, and binding upon all mankind; but a private Act only binds the parties to whom it relates. Upon the same principle that public Acts of Parliament must be supposed to be universally known, it was formerly presumed that every man must be attentive to what passes in the courts of justice of the state or sovereignty where he resides; and that therefore any one purchasing property which was actually in litigation, *pendente lite*, was considered to have notice of the suit, and to be bound by the judgment or decree therein. (3 Prest. Abs. 355.) But now *lis pendens* will not be binding on a purchaser who has no express notice thereof, unless, as we have already seen, it is duly registered in pursuance of the stat. 2 & 3 Vict. c. 11, s. 7.

Decrees.—Previously to the statute 1 & 2 Vict. c. 110, a decree of a court of equity was only binding on the parties and their privies in representation or estate, and was not therefore held to be *per se* a constructive notice to any other persons. But if a person who is neither party nor privy actually had such notice, he was, and still will be, bound by it. (*Harvey v. Montague*, 1 Vern. 57, 122; 1 Stor. Eq. 327; 2 Fonbl. Eq. 153, n.) Now under the statute 1 & 2 Vict. c. 110, decrees and orders of courts of equity are to have the effect of judgments (sec. 18); but with respect to the

latter, the act of docketing was not of itself considered as notice to a purchaser, neither is a registration of a judgment or decree under the more recent enactments; but if it can be shewn that a party actually had such notice, he would be bound accordingly, and the act of searching the register will be sufficient to affix him with such notice, unless it can be shewn that the search was restricted to a particular period in which the judgment in question was not entered. (*Hodgson v. Dean*, 2 Sim. & Stu. 221.) Neither is an act of bankruptcy, nor a commission or fiat in bankruptcy, notice of those facts to a purchaser (*Wilker v. Bodington*, 2 Vern. 599; *Collet v. De Gols*, For. 65; *Ex parte Knott*, 11 Ves. 609; *Sowerby v. Brooks*, 4 B. & A. 523); nor does the Act 6 Geo. 4, c. 16, s. 83, which makes the issuing of a commission notice of an act of bankruptcy, in certain cases affect a purchaser. Neither will a *bond fide* purchaser without notice be affected by a secret act of bankruptcy before his purchase, although it be followed by a fiat after his purchase. (*Pearce v. Newlyn*, 8 Mad. 186.) The registering of a conveyance or other document, even in a register county, will not be deemed constructive notice to subsequent purchasers; but that, to be binding, actual notice must be brought home to the party. "In America, however," the great law writer of that country observes, "the doctrine has been differently settled; and it is there uniformly held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or

equitable, in the same property. (*Parkhurst v. Alexander*, 1 John. Ch. R. 394.) The reasoning upon this doctrine," he says, "is founded upon the obvious policy of the Registry Acts; the duty of the party purchasing, under such circumstances, to search for prior incumbrances, the means of which search are within his power; and the danger so forcibly alluded to by Lord Hardwicke, of letting in parol proof of notice, or want of notice, of the actual existence of the conveyance. The American doctrine," the same learned writer proceeds to remark, "certainly has the advantage of certainty and universality of application; and it imposes upon subsequent purchasers a reasonable degree of diligence only in examining their titles to estates. But this doctrine," he adds, "as to the registration of deeds being constructive notice to all subsequent purchasers, is not to be understood of all deeds and conveyances which may be, *de facto*, registered; but of such only as by law are required to be registered, and are duly registered, in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity; and then the subsequent purchaser is affected only by such notice as would amount to a fraud." (1 Stor. Eq. 324, 325, referring to.)

Notice to agent notice to principal.—It has been a long-established rule of equity, that notice, whether actual or constructive, to an agent, is to be treated as notice to the principal; since it would

be a breach of trust in the former not to communicate the knowledge to the latter (2 Fonbl. Eq. 154 ; Com. Dig. tit. "Chancery," 4, cc. 5 & 6 ; 1 Stor. Eq. 326 ; *Merry v. Abney*, 1 Cha. Cas. 38 ; *Brother-ton v. Hatt*, 2 Vern. 574 ; *Jennings v. Moore*, ib. 609 ; *Sheldon v. Drummond*, Ambl. 624 ; *Coote v. Mammon*, 2 Bro. P. C. 596 ; *Le Neve v. Le Neve*, 3 Atk. 646) ; and this, even if the principal is an infant. (*Toulmin v. Steere*, 3 Mer. 222 ; *Sheldon v. Cox*, 2 Eden, 228.) It would indeed cause great inconvenience if the rule were otherwise, and notice would be avoided in every case by employing agents. Notice to the counsel or attorney is notice to the party who employs him in the transaction. (*Attorney-General v. Gower*, 2 Eq. Ca. Abr. 685 ; *Brother-ton v. Hatt*, 2 Vern. 574 ; *Newstead v. Searles*, 1 Atk. 265 ; *Maddox v. Maddox*, 1 Ves. sen. 61 ; *Ashley v. Baillie*, 2 ib. 386 ; *Le Neve v. Le Neve*, 3 Atk. 646 ; S. C. 1 Ves. sen. 64 ; *Tunstall v. Trappes*, 3 Sim. 301.) Nor is it necessary that such counsel, attorney, or solicitor should be employed in the whole transaction ; if employed in any part of it, it will be sufficient. The preparation of the conveyance by the vendor's solicitor, therefore, will be sufficient to affect the purchaser with notice. (See *antè*, vol. i. p. 38.) But in order that notice may be binding on the principal in cases of this kind, it must be notice in the same transaction or negotiation ; for if the agent, attorney, or counsel was employed in the same thing by another person, or in another business or affair, of which he might have forgotten

the facts, it would be unjust to charge his present principal on account of such a defect of memory: (Fonbl. Eq. lib. 2, c. 6, s. 5; 1 Stor. Eq. 327; Com. Dig. tit. "Chancery," 4, c. 5 & 6; *Fitzgerald v. Falconbridge*, Fitz. 207, 211; *Preston v. Tubbin*, 1 Vern. 286, 287; *Warwick v. Warwick*, 3 Atk. 291; *Worsley v. Scarborough (Earl of)*, 3 Atk. 392; *Hall v. Smith*, 14 Ves. 426.) Still, for all this, it seems that notice to a solicitor in one transaction, which is closely followed by and connected with another, so as clearly to give rise to the presumption that the prior transaction was present in his mind, and that he could not have forgotten it, will be considered as constructive notice to his client; à fortiori, if it is clear that at the time of the second transaction the first was fully in his mind. (*Hargreaves v. Rothwell*, 2 Keen, 154, 159; 1 Stor. Eq. 327, n. 5.) But knowledge of the incumbrance by the assigning trustee will not affect a purchaser who is unaware of it (*Willoughby v. Willoughby*, 1 T. R. 763); nor will notice to a purchaser affect a sub-purchaser under him who has no such notice. (*Ferrers v. Cherry*, 2 Vern. 384; *Brandling v. Ord*, 1 Atk. 571; *Lowther v. Carleton*, 2 ib. 242; *Ingram v. Pelham*, Ambl. 153; *Mertins v. Jolliffe*, ib. 311; *Andrew v. Wringley*, 4 Bro. C. C. 136; *Kenedy v. Daly*, 1 Sch. & Lef. 379.) Nor would a purchaser under the latter, even with express notice of incumbrances, be affected by it. If, therefore, one effected with notice conveys to another *without notice*, the assignee, in case he has the legal estate,

shall protect himself against prior incumbrances : so, *vice versâ*, if an incumbrancer without notice assigns to one who has notice, yet the assignee may protect himself in like manner. (Ambl. 313 ; see also *Harrison v. Forth*, Pre. Cha. 51 ; *Lowther v. Carlton*, 2 Atk. 242 ; S. C. 2 Eq. Ca. Abr. 685 ; *Sweet v. Southcote*, 2 Bro. C. C. 66 ; *Macqueen v. Farquar*, 11 Ves. 478.)

CHAPTER III.

INTERMEDIATE PROCEEDINGS FROM THE PERUSAL
OF THE ABSTRACT TO THE COMPLETION OF THE
PURCHASE.

1. *Of Clearing up and Perfecting the Title.*
 2. *Of the Search for Incumbrances.*
 3. *Practical Directions for Preparing the Conveyance.*
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1. *Of Clearing up and Perfecting the Title.*

THE purchaser's solicitor, on receiving back the abstract from counsel, if the title is approved of, should give early notice of the same to the vendor's solicitor; but if any objections are taken to the title, or any requisitions made, then he should take care to forward such objections and requisitions to the vendor's solicitor within the time appointed by the contract or conditions of sale; and if no time be appointed, he should, for the reasons already stated (see vol. i. p. 208), do so within a reasonable time, insisting on having the objections removed, or the requisitions complied with. If the vendor's solicitor assents to this, and proceeds to clear up the objections, it will then be necessary to reconsider the abstract, to see that all the requisitions have been duly complied with.

Practical observations on objections and requisitions.—Before, however, a vendor's solicitor un-

dertakes to remove any objections raised upon the title, or to comply with any other requisitions relating to it, it will be advisable to demand of the purchaser's solicitor whether these are the only matters objected to, or the only requisitions required (see *antè*, vol. i. p. 106); for it has not unfrequently happened, that where a purchaser is unwilling or unable to complete his purchase at the appointed time, his solicitor has raised frivolous objections which he knows to be unsustainable, merely for the purpose of spinning out the time until the purchaser can either raise the money to pay for the property, or obtain some sub-purchaser or other to take the bargain off his hands.

Comparison of abstract with title-deeds, &c.—The abstract ought, in every instance, to be compared with the title-deeds before it is submitted to counsel, by which means considerable time and expense would oftentimes be saved. It not unfrequently occurs, when the various documents are compared with the abstracts, that some discrepancy is discovered between them, which often requires a second opinion of counsel, thus increasing costs, and adding to those vexatious delays which are too often incidental to the completion of a purchase. Another great advantage of a previous comparison of the documents with the abstract is, that it enables the purchaser's solicitor, by short marginal remarks, to draw the attention of counsel to many facts and circumstances that are not sufficiently disclosed by the abstract, but which are often highly important to the title. Now the vendor's solicitor ought not to neglect this, because it is clearly established

that the vendor must pay the costs of all such examinations in case the title turns out bad, it being for his advantage that such previous investigation should be gone into; for, if this were not done, great additional expense might be incurred. (*Hodges v. Litchfield (Earl of)*, 1 Scott, 449.) Still, notwithstanding the advantage of adopting the above course, it is not the one usually followed by the Profession, and some eminent writers have even gone so far as to approve of the practice of deferring this examination until after the abstract has been perused by counsel in those cases where access could be readily had to the deeds in the first instance. That a previous comparison would be most advantageous to the purchaser, is too obvious to require further comment. The course, therefore, which can best attain so desirable an end, is the course, and the only course, a solicitor, if he faithfully discharges his duty to his client, can pursue.

How the title-deeds should be compared with the abstract. — The comparison of the title-deeds or other documents with the abstract is a most important duty, and requires the strictest scrutiny; for, if done in a cursory manner, the most serious consequences may not only possibly, but most probably will, ensue from it. It has, indeed, not unfrequently happened that an important clause, sometimes by accident, at other times by design, has been altogether omitted, and others have been abstracted in such a manner as to convey a very different signification from what the terms in the abstracted assurance would imply. Another point to which the

attention must be carefully directed is, to see that the instruments, whether deeds or wills, are duly executed and attested ; that every party who is named as a conveying party to a deed has placed his hand and seal thereto, and that each execution has been duly attested. And where it is necessary for any receipt for the consideration-money to be indorsed thereon, it must also be seen that such receipt clause is duly signed and witnessed. (*Kennedy v. Green*, 3 Myl. & K. 699.) If the deed is professed to be enrolled, or is required to be registered, it must be ascertained that such deed has been enrolled or registered accordingly ; and it must lastly be seen that every deed is properly stamped, —a subject of investigation that has been too often neglected, and yet a most important one, requiring great accuracy and a minute knowledge of the stamp laws. (1 Prest. Abs. 201.)

Vendor is bound to produce documents in verification of abstract.—The vendor is bound to produce all documents set out in the abstract, although they are not in his possession, nor the purchaser entitled to have them delivered over to him on completing his purchase (*Relingall v. Lloyd*, 2 Nev. & Man. 410 ; *Jermain v. Eggleston*, 5 Car. & Pay. 172) ; but this relates only to documents of a nature as are usually handed over to the purchaser, and does not include records, such as fines, or recoveries, or wills of real estate ; for in the latter cases, office extracts, probates, and copies, will be all that a purchaser has any right to call for. The expenses of the production of all deeds not in the vendor's possession, as also of attested copies, journeys, and

all other incidental expenses, unless otherwise stipulated for in the conditions of sale, must be borne by the vendor (*Boughton v. Jewel*, 15 Ves. 176; and see *antè*, vol. i. p. 31): but this will not, it seems, extend to attested copies of instruments on record; nor is the vendor bound to defray the expenses of any journeys unnecessarily incurred by a purchaser's solicitor in comparing the documents of title with the abstract. If, therefore, the title-deeds are in London, then, according to the established rules of practice, a country solicitor should instruct his London agent to inspect the deeds there, and he will not be permitted to charge the costs of his journey to town for that purpose. (*Alsop v. Lord Oxford*, 1 Myl. & Kee. 564.) But it will be otherwise where the documents of title are in the hands of persons residing in different parts of the country, for in that case the purchaser's solicitor may charge the vendor for all the journeys necessary for comparing them with the abstract, and will not be obliged to employ an agent in a country town where the documents may chance to be to perform that duty, in order to save these expenses. (*Rawlings v. Vincent*, Carth. 124; *Hughes v. Wynne*, 8 Sim. 85.)

Lost deeds.—In case any of the deeds are lost or destroyed, a question necessarily arises as to whether a purchaser could be compelled to accept the title. It seems, however, to be now decided that the mere fact of the loss or destruction of title-deeds will not afford a purchaser sufficient cause for rescinding his contract if the vendor can deliver over copies which would be evidence at law, and

prove that the originals were duly executed and delivered; but this the vendor is bound to supply the purchaser with, and unless he can do so, the purchaser will be entitled to annul the contract (*Bryant v. Busk*, 4 Russ. 4)—and this notwithstanding the deeds be destroyed by accident, as by fire or otherwise. For, as Sir John Leach observed (4 Russ. 4), every vendor must necessarily be bound to furnish the purchaser with the means of asserting his title and defending his possession. The title-deeds are the ordinary and primary means for that purpose. If the primary means do not exist, there may be secondary means to the same end. There may be means of proving what are the contents of the deeds, and that the deeds were duly executed and delivered. Assuming that the abstracts duly and fully prove the contents of the deeds, yet it remains to be proved that such deeds were duly executed and delivered; and the vendor must furnish the vendee with the means of such proof; and if no such proof can be furnished, the purchaser is entitled to be discharged.

Occupation how far notice of terms of tenancy.—It will be necessary not only to call for all leases, counterparts, and agreements relating to the property, but also, whenever the property is in the occupation of a tenant, to inquire into the nature of his tenancy; for if a purchaser neglect to do this, he will be considered to have implied notice of that title—notice of a tenancy being construed as implied notice of the terms under which the premises are holden. (Stew. Abs. 42; 3 Prest. Abs. 401; see also *Taylor*

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v. *Stibbert*, 2 Ves. 440; *Daniells v. Davidson*, 16 ib. 249; *Douglas v. Whiting*, ib. 254, cited; *Allen v. Anthony*, 1 Mer. 282; *Taylor v. Baker*, Dan. 71.)

Seisin and identity of parcels.—Land-tax and poor-rate assessments (*Doe dem. Smith v. Cartwright*, 1 Car. & Pay. 218) are usually received as evidence of seisin and identity of parcels; as are also receipts of rent, old leases, or counterparts of leases—also maps, terriers, and plans of the property. These facts may also be shewn by the evidence of parties well acquainted with the property; as of present or former occupiers; and the declarations of a deceased occupier as to the person of whom he held the premises, has been holden sufficient evidence of that fact,—such declarations being considered as made against his own interest, upon the recognized principle that the possession of every occupier is, *prima facie*, taken to be a seisin in fee, the identity of the lands being, of course, proved. (*Peacable dem. Uncle v. Watson*, 4 Taunt. 16; see also *Doe dem. Human v. Pettet*, 5 B. & Ald. 223; *Doe dem. Bagally v. Jones*, 1 Camp. N. P. C. 367.) Where it was necessary to prove the identity of parcels, or seisin, through the medium of persons acquainted with the property, the practice, until recently, was to require the facts so stated to be supported by affidavit; but now, a declaration, in pursuance of the statute of the 6th Wm. 4, for the suppression of extrajudicial oaths, is substituted instead. Where the title is derived through an heir, it will be necessary to ascertain that he was seised of the property, either actually

or constructively. An actual entry may be made either in person, or by some other person on his behalf—as his guardian, for instance; and an entry by a stranger, on behalf of an infant, has been considered in the light of an entry by a guardian for that purpose. The entry of one joint-tenant or coparcener will also be treated as the entry of all. A constructive acquisition may be inferred, where a person can be shewn to have exercised acts of ownership over the property, or received the rents and profits (*Davis v. Lowndes*, 7 Scott, 22); and even the continued possession by a tenant of the ancestor under a lease, by *elegit*, or by statute, will be sufficient evidence of a seisin on the part of the heir, without any actual receipt of the rent or entry by him on the premises. (Co. Litt. 15, a; *Newman v. Newman*, 3 Wils. 528; *Bushby v. Dixon*, 5 Dow. & Ry. 126.) With respect to incorporeal hereditaments, such as rents or advowsons, as there can be no actual entry made upon property of this description, the proof of seisin must be evidenced by shewing acts of ownership,—as by receiving the rents in the one instance, and by presenting to the living the other. (Com. Dig. tit. “Seisin,” C.)

To whom the abstract belongs.—As long as the contract remains open, the general property of the abstract is neither in the vendor nor in the vendee absolutely. If the sale goes on, it becomes the property of the vendee. In the meantime the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to shew on what

ground he did reject the title; the consequence of which is, that whichever party has the right to the possession of it for the time being may recover it from the other, notwithstanding the ultimate right of the property may possibly reside in him. (See 2 Dix. Title-deeds, 461; *Roberts v. Wyatt*, 2 Taunt. 268.) But whenever a purchaser rescinds a contract, he is bound to return the abstract, for it would be a mischievous thing if accounts of a person's title could get abroad; and therefore not only has the abstract to be returned, but no copy is to be kept, lest it should be used for a mischievous purpose. (*Ib.*)

2. *Of the Search for Incumbrances.*

If the purchaser's solicitor is satisfied with the title as it appears from the abstract and the documents therein referred to, his next course of proceeding is to ascertain if there are any incumbrances affecting the property which the abstract does not disclose. These it will be his duty to search for; but in addition to this, he ought also to ask the vendor's solicitor if there are any such, and whether, according to the best of his knowledge and belief, the vendor, or any of his ancestors or testators, have sold, mortgaged, or incumbered the property, and also whether there are any outstanding estates, judgments, annuities, Crown debts, or any other incumbrances whatever, except such as appear on the abstract, or have otherwise been disclosed in writing to the purchaser or his solicitor. In some parts of the kingdom, particularly in the west of England, a practice has sprung up amongst

the Profession of requiring a declaration to this effect from the vendor, a form of which will be found in the Appendix (*see Div. II. No. 37*); and it would afford a most beneficial protection to purchasers if this practice could be universally established. If the vendor's solicitor denies that there are any incumbrances, or wilfully conceals them, he will render himself personally liable to the purchaser. The vendor is bound to discharge every incumbrance before he can call upon the purchaser to accept a conveyance or pay the purchase-money. And if the incumbrances are such that the purchase cannot be completed on that account, the purchaser will be entitled to recover all his costs from the vendor, including also the cost of the conveyance, and this, it seems, whether the search was made before or after such conveyance was prepared. If the vendor's solicitor, on being asked, replies that there are no judgments, the search may be postponed until immediately before the execution of the conveyance.

Searching for judgments.—This search is now attended with less trouble and difficulty than formerly. Previously to the statute 1 & 2 Vict. c. 110, the practice was to search for judgments for ten years, and if any judgments appeared within that time, to search for ten years from the time of the most early judgment, and in like manner for ten years from each judgment which was so found, stopping at the period when the owner became adult, unless there was reason to suspect there were judgments against him whilst a minor. But now all judgments, in order to become binding upon pur-

chasers, must, in pursuance of the statute 1 & 2 Vict. c. 110, be registered every five years, so that there will be no occasion to extend the search beyond that period. The search must, however, now be made as well in the case of leasehold and copyhold as of freehold estates; and, notwithstanding it was formerly considered that leasehold estates were only bound from the time the writ of execution was delivered into the sheriff's office (*Jones v. Atherton*, 2 Marsh. 275; see also *Burdon v. Kennedy*, 3 Atk. 379; *Jeans v. Wilkins*, 1 Ves. 95), the statute of Victoria has rendered them liable in the same manner as freeholds. (1 & 2 Vict. c. 11; *Prideaux on Judgments*, 59, 72.) It must also be kept in mind, that entailed property is now subjected to judgments, which will be binding, not only upon the tenant in tail himself, but also on the issue in tail and the remainder-man, where the entail could have been barred without the consent of the protector. So that a purchaser of property of this description must search for judgments in the same manner as if he purchased lands in fee-simple. Nor can such search be dispensed with, even where the sale is by the assignees of a bankrupt; for, notwithstanding the Act now under consideration provides that the judgment creditor shall not be entitled to a preference in the case of the bankruptcy of the person against whom such judgment shall be entered up, unless such judgment shall have been entered up one year at least before the bankruptcy, it does not deprive him of such preference where such judgment has been entered up before that period. The search, however, in such cases may

be restricted to the commencement of one year next preceding the bankruptcy. Mr. Prideaux, in his able treatise on this subject, also says, pp. 81, 82, that "it may be useful to observe, by way of caution, that all judgments entered up against a mortgagor subsequently to the mortgage, are charges upon the surplus of the moneys arising from a sale under a power contained in the mortgage-deed, and that the mortgagee would be bound to apply such surplus in the proper discharge of all such judgments of which he has notice." Remarking, at the same time, that "there was no reason to doubt that, even under the old law, all such judgments were general charges in equity upon the surplus moneys in the hands of the mortgagee." In support of which, he refers to Mr. Serjeant Hill's opinion, stated in *Forth v. The Duke of Norfolk* (4 Madd. 506, note).

Facilities afforded in the search for judgments by recent enactments.—The inconvenience and uncertainty that were formerly incurred in searching for judgments where the vendor had a common name, which might have been equally applicable to many other persons (as the Smiths, Browns, Jones's, and Robinsons, for instance), are to a great extent, if not altogether, remedied by the 19th section of the statute, by which it is provided that no judgment shall affect any purchaser, unless a minute containing the name and usual or last place of abode, and the title, trade, or profession of the person whose estate is to be affected thereby, shall be left with the senior master of the Court of Common Pleas, who shall enter the name in a book in alphabetical order by the name and addition of such

person. If there is the slightest probability of judgments, a purchaser's solicitor can rarely dispense from searching for them with safety; for notwithstanding the 13th section of the Act (1 & 2 Vict. c. 110) declares that purchasers without notice shall not be deprived of the equitable protection they previously possessed, still such notice may probably be inferred from very slight circumstances, and, if proved, would give the judgment creditors the benefit of those extensive remedies the Act confers upon them. (*Prid. on Judgments*, 55.) It must also be recollected that if the purchaser sustains any loss or injury in consequence of his solicitor's negligence in searching for incumbrances, the latter will become personally liable to make good the same, and the purchaser will be entitled to maintain an action against him, and to recover damages accordingly. (*Forsall v. Jones*, 1 Vin. Abr. 54; *Brooke v. Day*, 2 Dick. 572; *Green v. Jackson*, Peake's N. P. C. 336; *Bakie v. Chandless*, 3 Camp. N. P. C. 17; *Ireson v. Pearman*, 5 Dow. & Ry. 187.) It may be proper also to remark, that although a vendor is bound to discharge all incumbrances prior to the conveyance, he is not bound to discharge those discovered afterwards, unless the covenants (as indeed is usually the case) are sufficiently ample to include them; but if they are not, the purchaser will, generally speaking, be wholly debarred of remedy against the vendor, as well in equity as at law (*Serjeant Maynard's case*, 2 Freem. 3; see also 3 Swanst. 651; *Cripps v. Read*, 6 T. R. 606; *Mathews v. Hollings*, Woodfall's Land. & Ten. 35; *Bree v. Holbeach*, Doug. 654; see also *Roswell v.*

Vaughan, Cro. Jac. 196; *Lysney v. Selby*, 2 Lord Raym. 1118; *Goodtitle v. Morgan*, 1 T. R. 755; *Hitchcock v. Giddings*, 4 Pri. 135); unless where the vendor was guilty of a fraud by concealing a defect in the title he was aware of, or suppressing some document by which this incumbrance was created, or on the face of which it appeared; for then the purchaser would not only be enabled to maintain a suit in equity for relief, but might even bring an action at law on the case for the deceit.

Disentailing deeds and acknowledgments of married women.—Where any disentailing deeds occur in the title, it must be seen that they have been duly enrolled in pursuance of the Fine and Recovery Substitution Act, 3 & 4 Wm. 4, c. 74, and also that the time of enrolment has not expired. And even where the time prescribed in the statute for enrolment has not expired, the purchaser's solicitor should take care to see that this is done before the conveyance is executed, and he should also ascertain by search that no previous assurance has been enrolled; and where any acknowledgments of married women have been taken, he must ascertain that they were taken before the proper commissioners; for the commissioners appointed under the Act have no power to act beyond the local limits of their respective districts, so that an acknowledgment taken elsewhere would be wholly inoperative. It must likewise be shewn that the acknowledging parties were of full age,—a minor, though a married woman, being under a disability to acknowledge a deed.

Crown debts.—Where it is at all probable that the vendor is an accountant to the Crown, a search

should be made for Crown debts. This must be made in the same office in the Common Pleas where judgments are to be searched for, and in which an index is kept of all debtors and accountants to the Crown. (2 Vict. c. 11, s. 8.) This, however, only relates to the Crown debts created or secured before the 4th of June, 1839. If, therefore, Crown debts may have been incurred previously, further inquiries should be made to ascertain whether such debts really exist or not. If such debts are found to exist, the purchaser may now be exonerated therefrom by paying the same into the Exchequer, under the provisions of the stat. 1 & 2 Geo. 4, c. 121, s. 10, previously to which a purchaser would not have been safe, although his money was actually paid into the Exchequer, unless he had procured a quietus to be entered up of record.

Lis pendens.—The same office in the Common Pleas should also be searched where there is any suspicion that a suit is pending respecting the property; but unless a purchaser has express notice of such pending suit, he will not be bound by it until a memorandum or minute is left with the senior Master of the Common Pleas, who is to enter such particulars in a book in alphabetical order. As there must be a re-entry every five years, it will be sufficient to confine the search to that period. (2 & 3 Vict. c. 11, s. 8.)

Search in case of suspected insolvency or bankruptcy.—When the vendor has been in difficulties, it will be advisable to search the Insolvent Court; and where a vendor was in trade, in case there was any apprehension of his having committed an act of

bankruptcy, it was usual to search the Bankruptcy Court for any affidavit of debts by creditors which might have been made the foundation of a commission or fiat in bankruptcy; but now, as all *bonâ fide* conveyances by a bankrupt previous to issuing a fiat against him are rendered valid, notwithstanding a prior act of bankruptcy, unless the purchaser had notice of it (1 & 2 Vict. c. 4; see also vol. i. 164, 165), and as the issuing a fiat is pretty certain to be known to all parties having any immediate transactions with the bankrupt, a search or inquiry of this nature is rarely made. Where, however, the vendor is a certificated bankrupt, and contracts to sell after-purchased property, it will be the duty of the purchaser's solicitor to see that the certificate of conformity has been duly enrolled.

Registered documents.—Where the lands lie in a register county, the register offices should be searched, in order to see that there are no registered incumbrances, as also to ascertain that the title-deeds have been duly registered, and the terms of the Registry Act duly complied with; and, notwithstanding the practice may not be to register wills, the purchaser has a right to insist upon this being done, and his solicitor should see that such be done before he completes the purchase, as a *bonâ fide* purchaser, without notice of the will, would, by registering his conveyance, be entitled to a preference to the devisee and all persons claiming under him. (*Jolland v. Stainbridge*, 7 Ves. 478.)

Annuities.—Where the property is much involved and incumbered, it will be prudent to search for memorialized annuities; but if the lands are situ-

ated in a register county, it will be sufficient to confine the search to the registry office.

Copyholds.—If the property is of a copyhold tenure, the court rolls should be inspected, in order to ascertain that none of the documents have been omitted in the abstract.

Indemnity against incumbrances.—If the incumbrances are of such a nature that the vendor is unable to discharge them, the purchaser will, as we have already seen (vol. i. p. 18), be entitled to annul the contract, and cannot be compelled to complete his purchase in consideration of any indemnity the vendor may think proper to offer him (*Farrer v. Nightingale*, 2 Esp. N. P. C. 639; *Barnwell v. Harris*, 1 Taunt. 430; *Hearne v. Tomlins*, Peake, N. P. C. 192; *Hibbert v. Shee*, 1 Camp. N. P. C. 113; *Duffell v. Wilson*, ib. 401; see also *Stew. Abs.* 346); neither, on the other hand, can the purchaser hold the vendor to his bargain, and call upon him for such indemnity. (*Id.*) Formerly, indeed, the rule seems to have been otherwise (*Halsey v. Grant*, 13 Ves. 73), and it used to be referred to the Master to consider what the indemnity should be; but it now seems to be settled that a purchaser cannot be compelled to accept a title with an indemnity, nor a vendor be called upon to give one. At the same time, if both parties are willing to enter into an agreement of this kind, they are at perfect liberty to do so. This, indeed, is a very common practice, where a person buys a property subject to a mortgage, in which case he is bound to indemnify the vendor against the mortgage (see the form in the Appendix;

Div. II. No. 4, clause 8), although he agrees to purchase subject to it, and the agreement was altogether silent as to the matter of indemnity. (*Warring v. Ward*, 7 Ves. 357; *Crofts v. Tritton*, 4 Taunt. 360.) As to what indemnity should be given or required, must necessarily be guided by such a variety of circumstances as to render it scarcely possible to lay down any precise rules or suggestions, as each individual case must entirely depend upon its own individual circumstances, although, generally speaking, if both vendor and purchaser are equally willing to complete the contract, and inclined to act honestly and liberally in the transaction, the matter may generally be arranged in a satisfactory manner.

3. *Practical Directions for Preparing the Conveyance.*

When the title is approved of, and every doubt and difficulty cleared up, the next and conclusive step towards winding up the bargain is the preparation of the purchase-deed and such other assurances as may be necessary for completing the purchase. This duty, as we have already seen, in the absence of an express stipulation to the contrary, devolves upon the purchaser's solicitor (vol i. p. 38). When the latter has prepared the draft, he should forward a fair copy of it to the vendor's solicitor for his inspection; and if the latter approves of the same, the draft may then be engrossed. If any alterations or additions be made, it will then be for the purchaser's solicitor to see how far they are material to his client's interests; but whether so or not, no

alteration should be afterwards made, however trivial such alterations may be, without acquainting the other party therewith previously to the engrossment of the deed.

With respect to the mode of conveyance to be adopted, this will rest with the purchaser, who is the proper person to pay for and tender the conveyance, and therefore has the best right to select what mode of assurance he may think proper. In ancient days the most usual mode of conveyance was by feoffment with livery of seisin, which has, in fact, continued in use even down to the present time. This mode of conveyance was in many cases considered the most eligible, as its operation was to clear all disseisins; and until recently it turned all other estates into mere rights. This result was, however, destroyed by the recent statute 3 & 4 Wm. 4, c. 27. And now every tortious operation of a feoffment is taken away by the still more recent enactment of the 8 & 9 Vict. c. 106; so that feoffments having now no greater effect than an ordinary innocent mode of conveyance of the property, and the giving of livery of seisin being attended with inconvenience and expense, that mode of conveyance is likely soon to grow out of use altogether. In fact, after the Statute of Uses had introduced the modes of assurance by lease and release, and also by appointment, feoffments became more rarely used, except in the three following instances:—1. Where the conveyance was made by a corporation, and this from the erroneous supposition that as corporations could not be seised to the use of others, they could not convey under a deed operating under the Statute of

Uses, on which account the practice was to make them convey either by feoffment, or by a common-law lease to be perfected by entry, and a release founded thereon. 2. To save the stamp-duty of the lease for a year; but this the statute 55 Geo. 3, c. 184, put a stop to, by charging the same stamp-duty on a feoffment as if a lease for a year had been actually attached to it. 3. To acquire a tortious fee, which, as we have already seen, cannot now be done.

Release at common law.—Another mode of conveyance was by a release at common law, which may be classified under the five following heads, viz.:—1. By way of enlargement; as where a remainder-man releases to the particular tenant in possession. 2. By way of passing an estate; as where one coparcener, or joint tenant releases to another coparcener or joint tenant. 3. By way of passing a right; as where a disseisee releases to a disseisor. 4. By way of extinguishment; as if any tenant for life makes a greater estate than he is warranted in granting, and I release to the grantee; or if the lord release to the tenant his seignorial rights. And 5. By way of entry and feoffment; as where a disseisor releases to one or two disseisees. (See *Wat. Convey.* edited by Morley, Coote, and Coventry.) In order, however, to give operation to a release, it was absolutely necessary that the releasee should be in actual possession of the property; and hence the modern practice sprung up of creating a term of years by way of bargain and sale under the Statute of Uses, which that statute executed into the actual

possession in the lessee without entry, who thereupon became capable of accepting a release of the property,—the two instruments forming, in point of fact, but one assurance ; and though the bargain and sale purported to bear date before the release, both assurances were, in reality, executed at the same time, forming one conveyance under the general name of lease and release. A few years since, an Act was passed for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties (4 & 5 Vict. c. 21), since which the lease for a year has been generally dispensed with in practice. It was, however, necessary that a release, to operate under this Act, should be expressed to be made in pursuance of it, and the deed of release was, and is still, chargeable with the additional duty for which a lease of a year would have been liable. (Sec. 1.) Another Act was afterwards passed, specifying to simplify the transfer of property ; but it was found altogether so inadequate for the intended purpose, that it was deemed prudent to repeal it by an Act passed in the session next immediately following (8 & 9 Vict. c. 106). By this last-mentioned enactment, all corporeal tenements and hereditaments were declared, as far as regarded the conveyance of the immediate freehold thereof, to be deemed to be in grant as well as in livery (sec. 2), so that it may now be conveyed by deed of grant only—a species of assurance that was formerly only applicable to incorporeal hereditaments, such as tithes, rent-charges, advowsons, or the like. For the time to come, therefore, there is no doubt that the conveyance by

grant, being the most proper, will supersede the present assurance by release, and, with appointments under powers, become the usual mode of passing real property. Still, however, the stamp-duty for the lease for a year attaches to a conveyance by grant, as it previously did to the release, which levies a heavy and most improper tax upon small purchases. Another Act was also passed in the same session for the purpose of facilitating the sale and conveyance of real property (8 & 9 Vict. c. 119), which directs the conveyance made according to the forms set forth in the first schedule to that Act, or to any other deed which shall be expressed to be made in pursuance of it or referring thereto, shall employ in any such deed respecting any of the forms of words contained in column I. of the second schedule thereto annexed, and distinguished by any number therein, such deed shall be construed as if such party had inserted in such deed the form of words contained in column II. of the same schedule, and distinguished by the same number as is annexed to the form of words employed by such party; but that it should not be necessary in any such deed to insert any such number. (Sec. 1.) It also enacts, that unless there was a special exception of the same, the deed should include the usual general words, "all houses, &c." and the reversion, &c. "and all the estate, &c." (Sec. 3.) But it still retained the harsh stamp-duty of the lease for a year. And it then directed that the remuneration for the deed under the Act should be estimated by the skill displayed, and not, as formerly, by the number of folios inserted. (Sec. 4.)

This Act does not seem to have met with any approbation amongst the Profession, and as the fifth section provides that a deed not taking effect under this Act shall be as valid as if the Act had not been made, the Profession seem almost universally to have availed themselves of this saving clause, and still employ the precedents formerly in use in preference to the scheduled forms set out in the Act. Mr. Browell, indeed, in his explanatory notice to his useful edition of the recent Real Property Statutes, very properly remarks (Browell's Real Property Statutes, p. 283) that "great caution appears to be requisite in the use of this Act, as the forms in its schedules are in strictness appropriate only to the most simple conveyances. Even," he continues to observe, "the common case of an appointment by a vendor seised to uses to bar dower to similar uses in favour of a purchaser, seems one in which the Act cannot with propriety be made available to any important extent, inasmuch as the form in the first schedule is that of a grant in fee-simple, and the covenants in the second schedule are framed with reference to an assurance of that simple description. He further remarks that "the Acts give a particular efficacy to a particular form of words, and that the slightest deviation from that form will endanger the operation of the statute with reference to the covenant in which the mistake occurs, and such covenant may then, under the fifth section of the former, or the fourth of the latter Act, be left to the very doubtful effect it may have by its own independent operation."

Other modes of assurance.—Other modes of

common assurance were fines and recoveries, the two former of which we have already seen have been recently abolished. In addition to these may be added deeds of bargain and sale, and appointments in pursuance of powers under the Statutes of Uses and Exchanges,—modes of assurance that may still be resorted to ; but a conveyance by way of appointment is the only one of them that is now often or likely to be resorted to.

Bargain and sale.—A bargain and sale is defined to be a kind of real contract, founded upon some pecuniary or valuable consideration for the passing of real estates by deed indented and enrolled, and deriving its operation and effect under the Statute of Uses. Before this statute, a contract for the sale of land raised a use, to convert which into a legal estate an actual conveyance was necessary ; but that statute supplied the conveyance, and transferred the seisin of the vendor to the use of the purchaser, who having thus the seisin and the use, became seised of the legal estate without any other conveyance. The stat. 27 Hen. 8, c. 16, however, required this assurance to be enrolled in some of the courts at Westminster, or with the clerk of the peace of the county in which the lands are situate, within six *lunar* months from the time of the delivery (Hob. 140 ; 2 Ins. 673 ; Shep. Touch. 223), which period has been enlarged by the late Act, 3 & 4 Wm. 4, c. 74, with regard to enrolments in Chancery to six calendar months. And although the time of enrolment may be thus postponed, yet, when completed, the deed takes effect from the time of delivery, and not from the time of enrolment.

(2 Ins. 875 ; *Muleny v. Jennings*, ib. 674 ; *Thomas v. Popham*, Dy. 218.) Care, however, must be taken to enrol the deed within the prescribed time, otherwise it will become inoperative.

Use cannot be limited to arise out of a bargain and sale.—As the Statute of Uses executes the use in the bargainee, and as a use cannot be limited on a use, all ulterior uses limited to arise out of the seisin of a bargainee, under a deed of bargain and sale, will necessarily be void as such, although they will still be good in equity as trusts ; hence it follows, that an effectual power of appointment, capable of passing the legal estate, cannot be created by way of bargain and sale ; and, as added to these inconveniences, the expense is greater than the ordinary conveyance by grant or release, because, in addition to the costs of enrolment, the same duty attaches as if a lease for a year was employed ; deeds of bargain and sale have not often been used as a mode of assurance between vendor and purchaser.

Distinction between ordinary bargains and sales, and bargains and sales under the Bankrupt Acts.—A bargain and sale was formerly the universal mode by which property was conveyed under a commission of bankruptcy ; but that species of assurance, except as to copyholds, has been taken away by the recent enactment of 1 & 2 Wm. 4, c. 56, which vests all other real estates of the bankrupt in his assignees, by virtue of their office. But bargains and sale under the Bankrupt Acts, differed, both in nature and quality, from a bargain and sale under the Statute of Uses ; the latter being a con-

tract for money or money's worth, by the owner of the land for the alienation of his interest; which contract raised a use in favour of the purchaser, grounded on the seisin of the bargainer; which use was by the statute executed into possession the moment the deed was enrolled; but a bargain and sale under the Bankrupt Acts is merely the execution of a naked authority given to certain persons by the commission or fiat to dispose of the bankrupt's estate, and has no other title to the appellation of a bargain and sale than that which it derives from the occurrence of the words "bargain and sell" in the statute which confers, and the instrument which executes, the authority. (Hayes's Conv. 97, n. 6. See the form of conveyance of a bankrupt's real estate to a purchaser, *App. Div. II. No. 17.*)

Appointment.—Where a power of appointment is given, in addition to the ordinary modes of assurance, the donee of the power may convey by a single deed, and thus avoid the expense of the stamp for a lease for a year, which is not required in this mode of assurance. Its disadvantages are, that the conveyance may possibly fail of effect for non-compliance with the terms of the power, added to which it is at least a doubtful point whether the covenants for title run with the land. This arises out of the principle that the purchaser coming in under the deed creating the power, and not under the party exercising it, the former claims by a title paramount to and independently of the latter, and therefore for want of privity of estate the appointee cannot claim the benefit of covenants entered into with the donee

of the power. Upon the same principle, the exercise of the power would have overreached judgments entered up subsequent to the deed creating such power, even where the appointee has notice of them ; but this, as we have already seen, has been done away with by the recent Act 1 & 2 Vict. c. 110, except as to purchasers who have no notice of the incumbrance.

Exchanges.—An exchange at common law is a mutual grant of equal interests, the one in consideration of the other. (Shep. Touch. 16 ; 2 Black. Com. 323.) In a conveyance of this kind no livery of seisin was required (Co. Litt. 506 ; Perk. Sect. 285), the assurance being perfected by the entry of both parties, which, indeed, is indispensably necessary to render it valid ; so that if either party die before this be done, the exchange will become inoperative. (See Butl. note to Co. Litt. 276.) An exchange can only be made betwixt two parties, though the number of persons of which such parties consist is immaterial. (3 Wils. 483.) The foundation of the assurance at common law is a mutuality of interest, and an implied warranty which engenders the right of entry in the case of eviction ; the latter is, however, now destroyed by the recent statute of 8 & 9 Vict. c. 106, by the fourth section of which it is enacted, that an exchange made after the 1st of October, 1845, of any tenements or hereditaments, shall not imply any condition in law ; but as it still leaves the equitable doctrine untouched, by which, after mutual conveyances, one estate may be rendered liable to the incumbrances of the other, it has been justly remarked that a greater degree of

practical inconvenience arises out of this equity than any which formerly existed from the pre-existing form of exchange, which had in point of fact nearly become obsolete. (Browell's Real Property Stat. 276.) In an exchange it was not formerly necessary that it should have been made by deed, unless the subject of it lay in grant, or was situate in different counties; in other cases a mere note in writing would have been sufficient (Co. Litt. 50, 51); but now the statute of 8 & 9 Vict. c. 106, enacts, that an exchange of any tenements or hereditaments, not being copyholds, made after the 31st of October, 1845, should be void at law unless made by deed. (Sec. 2.) This mode of assurance has not, however, been often resorted to in modern times, the object of it having usually been effected by mutual releases, the one being expressed to be made in consideration of the other (*see the Form in the Appendix, Div. II. No. 28*), instead of making each a pecuniary consideration for the whole value; not only because it more accurately describes the transaction, but what is often highly important, considering the present high scale of stamp-duties, it saves the *ad valorem* duty which would otherwise attach on each conveyance, and by the Stamp Act (55 Geo. 3, c. 184), if the sum paid for equality of exchange is under 300*l.* the common deed-stamp is sufficient; but if it amounts to or exceeds that sum, an *ad valorem* duty, the same as on purchases to that amount, will become payable.

Disentailing deeds and acknowledgments of married women.—We have already seen (*antè*, vol. i. 142, *et seq.*) that a tenant in tail may bar the en-

tail and convey the entailed property by deed enrolled; and as the Act empowering him to do so does not prescribe any particular mode of assurance, the conveyance may be made by any existing mode of assurance by which property may be conveyed from one party to another. As the deed, however, requires enrolment, where a power of appointment is intended to be reserved, or uses are intended to arise out of the seisin of the party to whom the property is conveyed by the disentailing deed, in order to prevent the possibility of the legal estate vesting in the grantee or releasee, it has become the more usual practice to omit the words "bargain and sell" in the conveyance, using only the words "grant and release," or "grant, release, and confirm." But notwithstanding a deed of bargain and sale had the disadvantage above alluded to, still, where the sole object of the conveyance was to convey an estate immediately to a purchaser, who was indifferent as to reserving a power of appointment, and as it took effect without a lease for a year, the expense of enrolment of that instrument was saved, as the lease for a year, as well as the release, required enrolment. But now a lease for a year is disused, so that at present a bargain and sale has no advantage over the modern grant and release; but the former has this inconvenience, viz. that it has been doubted whether, if a disentailing deed by bargain and sale goes beyond the mere purpose of effecting a sale to a purchaser—as if it were made for the purpose of resettling the estate, or converting the entail into an estate in fee-simple,—a 5*l.* stamp may not be necessary; it seems, upon

the whole, that the assurance by grant under the recent enactments is the most eligible mode for barring the entails at the present day. (*See the Forms in the Appendix, Div. II. Nos. 22, 24, 25, 26.*)

When distinct deeds will be necessary.—It not unfrequently happens that a tenant in tail, selling part of his property, is desirous of barring the entail in the residue which he intends to retain the possession of. In a case of this kind it will be advisable to bar the entail by a distinct deed from that by which the property is conveyed to the purchaser (*see the Form in the Appendix, Div. II. No. 22*), a course which, indeed, is always to be recommended where the deed of conveyance is likely to run to any considerable length, as the whole conveyance must be enrolled at the vendor's expense; for the same reason that he was obliged to bear the expenses of a fine and recovery, when either of those assurances was necessary for perfecting his title.

Leaseholds and copyholds.—Leasehold property passes by deed of assignment, and the legal estate of copyholds by entry on the court rolls; but in addition to this, there is usually a deed declaring the uses of the surrender. (*See the Form in the Appendix, Div. II. No. 36.*) Freehold, leasehold, and copyhold estates may, however, be all conveyed by the same deed (*see the Form in the Appendix, Div. II. No. 35*), a subject I shall enter upon more fully when I come to treat of assurances relating to leasehold and copyhold property.

The conveyance should always commence with the date, although, in point of fact, it will be equally good if it has no date at all, or an impossible date, as the 30th of February, the 31st of November, or the like; if the time of delivery can be proved; for a deed takes effect from the time of its delivery, and not from the day on which it is dated. (Co. Litt. 46; Dy. 28; 2 Black. Com. 304; *House v. Laxton*, Cro. Eliz. 890; *Stone v. Boyle*, 3 Lev. 348; *Doe v. Day*, 10 East, 427.) When conveyances by lease and release were in use, the practice was to date the bargain and sale for a year on the day preceding the release, unless the latter was executed on a Monday, in which case the bargain and sale was dated on the Saturday, leaving the interval of a day, in order that it might not appear to have been executed on a Sunday; still the latter caution was unnecessary, as the statute for the better observance of the Lord's day (29 Car. 2, c. 7) applies only to process and proceedings of the courts, and dealings in the course of trade, and not to private transactions of individuals as between themselves by way of conveyance. Sometimes the lease and release are, from inadvertence, dated on the same day; but even then, the conveyance has been held equally good by giving priority to the lease for a year. (*Taylor v. Horde*, 1 Bur. 103, 107.) Mr. Preston has also expressed an opinion that, "supposing it should appear in evidence that the lease and release were both executed on the same day, but the release was executed before the lease for a year, it is highly probable that under these circumstances the Court

would support a title derived under these instruments. The lease and release," he continues to observe, "are parts of the same assurance, and the Court might well decide that the execution of the several instruments was to be considered as one entire transaction, and that the law gives priority in its construction to the execution of the lease for a year." (2 Prest. Con. 364; see also *Cromwell's* case, 2 Rep. 74, b; *Ferrers v. Ferrers*, Cro. Jac. 643; *Herring v. Brown*, 2 Show. 185.) The same learned writer also observes, that in some cases there may be a mistake in dating the lease and release by giving a priority of date to the release instead of the lease. Under these circumstances, he considers the recital in the release would in all probability be the foundation for averring the prior delivery of the lease for a year, thus making it a good and sufficient groundwork for the release, or the recital would be evidence of a separate, distinct, and antecedent lease; and the rule of law, being (as we have already seen), that a party may admit a deed as dated on one day, and first delivered on another. Questions of this kind are, however, now become less important than formerly, when conveyances by lease and release were the most common modes of assurance, but which, now that the lease for a year may be dispensed with, is seldom resorted to. (*House v. Laxton*, Cro. Eliz. 890; *Stone v. Bayle*, 3 Lev. 348; *Lord Say and Sele's* case, 10 Mod. 40; *Barker v. Keate*, Freem. 250.)

Indenture.—Formerly, when deeds were more concisely drawn than has been the modern practice,

it was usual to write both parts on the same piece of parchment, with some letters of the alphabet written between them, through which the parchment was cut, either in a straight or indented line, so as to leave half the letters on one part and half on the other; but the present practice is merely to cut the parchment in a waving line, without cutting through any letters at all, and which serves very little other purpose than giving name to the instrument; nor is it necessary that the deed should be indented at the time of delivery, for if done afterwards, it will be equally valid. But until this be done, it was held to be no indenture, or capable of operating as such. (Shep. Touch. 50.) An indenture, it must also be remembered, is a more powerful instrument than a deed-poll, for all the parts of an indenture make but one deed (Shep. Touch. 50; Plow. 134; 26 Hen. 6, cc. 24, 25; Litt. S. 370; 6 Hen. 6, c. 35; 35 Hen. 6, c. 34), and every part is of as great force as all the parts put together, working by estoppel, and barring and concluding every party executing it (Plow. 421, 434); whereas a deed-poll is but of one part, and will be expounded to be the sole deed of the party making it, and the words therein contained will be construed to be binding on him only, and therefore cannot create an estoppel in point of estate. (Shep. Touch. 53.) The repealed Act of the 7 & 8 Vict. did away with the necessity of indenting a deed, not even requiring that an instrument, to have its operation, should be so intitled; so that an assurance under that Act, instead of commencing with "This Indenture, &c." began "This Deed, &c." That

Act has however been repealed by the more recent enactment of the 8 & 9 Vict. c. 106, by which indentures have not only regained their former name, but every deed purporting to be such is to have that effect, although not actually indented.

Of the parties.—With respect to the parties to a deed, they should be described by their proper Christian and surname, place of abode, and additions; or in the case of a corporate body, by the name of incorporation; sometimes also it will be necessary to state the particular situation in which they stand to the conveyance; as “trustee, heir-at-law, executor, &c.” The order also in which the parties should be placed in the deed with regard to their estates and interests will require some attention, though an error in this respect will not invalidate the assurance. The correct way of arranging the parties is to place the granting parties first: and amongst these, those having legal estates must have the priority; next, those having equitable or beneficial interests; and after these, the parties to whom the legal estate is to be conveyed; and then those taking equitable estates, if the latter are to be made parties to the deed. Where persons assigning or surrendering chattel interests are parties, they are placed next after the persons having equitable estates of freehold. Where husband and wife are the conveying parties, they are usually coupled together in the conveyance; as John Smith, of, &c. and Ann, his wife, &c. mentioning only the Christian name of the wife. The general rule that no one can grant by deed, or take an immediate estate under it without being named as a party, does not extend to persons

taking by way of use, or the benefit of a trust, or any estate by way of remainder; so that it is not necessary where such are intended to take in that way to make them parties to the deed; and now, under the recent statute, 8 & 9 Vict. c. 106, parties not named in the premises of a deed may take immediately under it. (Sec. 5.) When a vendor who holds an estate under the usual dower uses conveys to a purchaser, in strict technical propriety the dower trustee ought to join, upon the principle that as the fee-simple is professed to be conveyed, all the estates forming component parts of that fee should be included in such conveyance; still it is a matter of no real importance, the trustee's estate being no more than a remainder for the life of the vendor expectant on the forfeiture of his life estate, and it is understood that the late Mr. Butler has expressed an opinion that a purchaser cannot insist on the concurrence of the dower trustee, unless the power be either suspended or destroyed. Persons also are sometimes made parties, not actually for the purpose of conveying any thing, but merely for concurring in the conveyance, either because their consent is essential to the validity of the deed, or because they stand in such a relation to the transaction that it is desirable there should be recorded evidence of their knowledge of it. Hence, for example, where a person has devised lands to trustees, upon trust to sell, and pay debts and legacies, the heir-at-law and legatees are frequently made parties to the conveyance to the purchasers, although in legal strictness they are not necessary parties to such conveyance. (*See*

the Form in the Appendix, Div. II. No. 21.) When a vendor dies between the time of signing the contract and the completion of the purchase, as the purchase-money will then go to his executors, and form part of his assets (*Sykes v. Listor*, 5 Vin. Abr. 451; *Baden v. The Earl of Pembroke*, 2 Vern. 213; *Bubb's case*, 2 Freem. 38; *Smith v. Hibbard*, 2 Dick. 712; *Foley v. Perceval*, 4 Bro. C. C. 419), the executors or administrators must be parties to the conveyance, to release their claims and acknowledge the receipt of the purchase-money, as must also the heir-at-law, to convey the legal estate in the property, which still remains in him. (*See the Form, Div. II. No. 15.*) A bankrupt is also made a party to the conveyance of his estate, to obviate any difficulty to which a purchaser might otherwise be subjected in maintaining or proving the title. (*See the Form, Div. II. No. 17.*) By a late Bankrupt Act also (6 Geo. 4, c. 16, s. 28; *Ex parte Thomas*, 1 Moo. & M. 64), the Lord Chancellor is empowered, upon petition, either by the assignees or a purchaser, to direct the bankrupt to join in the conveyance; and in case of his refusal, the order of the Court will have the same effect as if he had actually concurred. So, where the consent of any person is required by the terms of a power, or a trust, or as in the case of a protector under a disentailing deed, he should be made a party to the deed requiring his concurrence, which, though not actually necessary, will effectually prevent any questions from arising as to whether a prospective or retrospective consent is sufficient. (*Conveyancer's Recital Book*, 20.)

In the conveyance of an equity of redemption the mortgages should either be made a party, or at any rate have notice of the purchase; because if he were to advance any further sum without having had either express or implied notice of it, such sum would be a valid charge on the estate in the hands of a purchaser. (*Shepherd v. Titley*, 2 Atk. 348, 349.) It sometimes happens, that when the contents of a deed are extensive and complicated, persons object to be parties, from an apprehension that they should be considered as much bound by assertions in the recitals, as by the effect of the deed; but it seems that, generally speaking, none of the parties would be bound further than they appear from the general import of the deed to have agreed to be bound, and that the general expressions, *and it is hereby declared and agreed by and between the said parties, &c.* would be considered as applying to those only who are immediately interested in such agreement. But to remove all doubt about the matter, a general clause may be inserted, referring each distinct part of the deed to the person particularly interested in it.

Of the recitals.—The recitals must ever depend upon the particular circumstances and state of the title, so that it is scarcely possible to lay down any precise rules upon the subject. As a general maxim, the best course to follow is to avoid loading the conveyance with unnecessary and lengthy recitals, but at the same time never to omit the recital of any fact or assurance that may serve to develop the relationship in which the conveying

parties stand to each other with respect to the subject-matter of conveyance. If the deeds that are to be delivered over to the purchaser are of themselves sufficient to enable him to defend his title, no recitals are essential to his security; in such case, therefore, the recitals may be very short, or may be omitted altogether. If, on the other hand, his title depends upon circumstances which do not appear on the face of the deeds delivered to him, these circumstances should be all set forth in the recitals.

Where the property is conveyed under a power of appointment.—If the conveyance is made by appointment and release under the common dower uses, the deed of conveyance, by which the power is created, should always be recited (*See the Form, Div. II. No. 3, Clause 2*); as indeed it should in all cases where a power of appointment is exercised. Sometimes the instrument creating the power is recited in the *testatum* clause; as, “in consideration of, &c. the said A. B. by virtue and in exercise of a power, &c. limited to him by a certain indenture” (stating the assurance, date, names of parties, &c.) “and of every other power, &c. doth by these presents appoint, &c.” In the recital of powers, it is unnecessary to recite any thing further than what shews that the exercise then intended to be made of the power is warranted by it. So where a power is intended to be exercised, it will be unnecessary to recite the uses which are limited to take effect in default of appointment. If there be a power of appointment in two persons jointly, and in default thereof, a similar

power to the survivor, and such last-mentioned power afterwards vests in such survivor, who is desirous of exercising it, the former power should be recited, as also that no joint appointment was ever made, and the fact of the death of the other party, by means of which the latter power became vested in the survivor. (See Convey. Recital Book, 43.)

Where the vendor is seised in fee.—Where the vendor is seised absolutely in fee-simple, and conveys by lease and release, it is often sufficient to recite merely that he is so seised, and the agreement to purchase; but where the legal estate is outstanding, or the property subject to a mortgage or other incumbrance, then it will be necessary by the recitals to shew all these facts, and the relation in which the conveying parties stand to each other respecting them.

Conveyances of trust-property.—In all conveyances of trust-property, if there is a power for the trustees to give receipts, it will be sufficient to recite the creation of the trust, and the power to give such receipts, and there will be no occasion to recite the trusts of the purchase-money. But where the trustees are not invested with such a power, and the circumstances of the case make it incumbent on the purchaser to see to the application of the proceeds of the sale, it will be proper to disclose the trusts, and the persons beneficially interested in the purchase-money ought to be made parties to the deed for the purpose of releasing their claims on the property. In all cases, also, where trustees convey, it will be proper to set forth so much as justifies them in so doing. Thus, for example, if

A. be originally a trustee for B., and C. afterwards, by any means, becomes entitled to the benefit of this trust, the manner in which C. became so entitled should be recited in the deed.

Order in which the recitals should be made.—

Generally speaking, the different documents should be recited according to the priority of their respective dates, and other facts and transactions according to the priority of time at which the same occurred; but where there are several distinct transactions to be stated, one independently of the other, it is sometimes better to go through the whole recital of one transaction, before the recital of the other is entered upon at all. It is better to recite deeds, as principal deeds, if the party has the original deeds and can depend upon the recital of them; but if he neither has the deeds, nor can depend upon the recitals, then they should be recited as recited deeds. There is also, it must be kept in mind, a difference between the recital of a deed and the recital of the effect of that deed: in the former instance the language of the deed should be rigidly adhered to; in the latter it may be varied. Some deeds, however, from their very nature and operation, require to be formally recited, and not simply the result stated; as where the reciting deed is a conveyance to uses to bar dower, when it would be inaccurate (though often done) merely to state the result, and say that the lands were limited to the usual uses to prevent dower, because there are several minute forms adapted to, and employed for, this purpose, particularly as to the mode of executing the power of appointment; and no one, from

such general expressions, would know what the exact uses were. But where the direct result of a former deed or instrument is one or more simple fact or facts, which contain within themselves all their own consequences, without looking further into the language or frame of that instrument, it may then be proper to state the result without the instrument. Thus, where a man is seised in fee, it will be sufficient to state that fact without stating how he became so entitled. (See Conveyancer's Recital Book, p. 37.) It sometimes happens that strict technical words have not been employed to create the estate, and this frequently happens in the case of entails created by will. Whenever this occurs, it will be more prudent to state the result; as that the testator devised the premises in question to A. for life, with remainder to his first and other sons in tail, instead of inserting the actual terms of the devise, where such terms can possibly be construed to have a doubtful or equivocal import; for, in the former case, the parties to the deed will be estopped from denying the estate devised to be other than that recited; but if the words themselves were set out in the recital, then the parties would be equally estopped from denying the legal import of the recited words (*Rountree v. Jacob*, 2 Taunt. 141; *Baker v. Dewey*, 1 B. & C. 704), which, to say the least of it, might cause doubts and questions, which could never have arisen if the course above suggested had been resorted to.

Description of parties.—In describing the parties to the recited deed, it is usual only to give

their additions, as esquire, gentleman, &c. omitting their residence; it is also a common practice to omit the addition, and simply state that the party is described in the recited document: as John Smith therein described of the one part, and John Styles therein also described of the other part. Where several parties convey in separate and distinct characters, their relationship should, however, be distinctly pointed out by the recitals. For example: suppose the necessary parties to the conveyance are the heir and executor of a deceased mortgagee, and the owner of the equity of redemption to whom the estate has been limited to the usual dower uses, and who has mortgaged the property to the deceased mortgagee. In this case, after naming them as the parties, it will be necessary to recite—1. The conveyance to the owner to the dower uses. 2. The conveyance to the mortgagee. 3. The death and will of the mortgagee, and the probate of his will. 4. The contract for sale to the purchaser. And, 5. The money then due on the mortgage. (*See the Form, Div. II. No. 10.*)

Recitals to identify the parcels.—Sometimes the recitals in previous deeds are inserted for the purpose of identifying the parcels, and the course through which they have been transmitted, which is often important to disclose facts not apparent on the title-deeds themselves, as in the case of property descending from ancestor to heir. This, however, may often be done shortly, by being superadded to the description of the parcels; as, “which said messuage, &c. were formerly the inheritance of A. B. who died intestate, and descended from him to R. B. his

nephew and heir-at-law, who devised the same to," &c.; or, "all which said hereditaments and premises were formerly the inheritance of A. B. to whom the said premises were conveyed by indentures of lease and release bearing date, &c. and made between, &c. and the said A. B. &c. and the said A. B. by indentures of lease and release bearing date, &c. conveyed the same," &c.

Assignment of terms.—In the assignment of terms of years, either to a purchaser beneficially or to a trustee in trust to attend the inheritance, it has long been a common practice to omit the intermediate assignments, and confine the recitals to the creation of the term and the last assignment, merely reciting that by a certain indenture made between the parties (naming them), the term was created, which by divers means assignments, and ultimately by the last and then existing assignment, became and is still vested in the assignor. (*See the Form, Div. II. No. 22, Clauses 2, 3.*)

As to the date of recited documents.—It is a common practice whenever the date of an assurance or a matter of fact is stated, to employ the words "on or about," in order to guard against any error as to the particular day referred to; as also to recite that the assurance is made, "or expressed to be made," between the parties named. The latter, Mr. Coventry treats as absurd, conceiving that those expressions imply that a deed can be made by other persons than those named in it. Mr. Jarman, however, seems to take a more correct view of the case, and observes that the words "expressed to be made" are obviously designed to provide

against the possible event of the recited deed not being executed by all the persons who are professed to be parties to it ; and in such case their insertion seems to be necessary to complete accuracy, since a deed cannot correctly be described to be made by a person who does not execute it. They would of course particularly approximate when any of the professed parties to the deed refuse to execute it ; as where a trustee disclaims the trust-estate intended to be vested in him. The deed of disclaimer reciting the trust-deed should state it as a deed expressed to be made between the intended grantors and the trustee who refuses the acceptance of the estate intended to be invested in him.

Recitals no estoppel except as between parties.—

Recitals, although operating by way of estoppel to the parties to the deed (*Doe v. Sherlock*, 1 Fox & Smith, 78 ; *Doe v. Saunders*, ib. 28 ; *Rees v. Lloyd*, Wightw. 123), do not afford any evidence as against other persons (3 Prest. Abs. 8) ; still, where they have been supported by long, uninterrupted possession, and relate to facts which have been within the knowledge of the parties, especially if those facts are stated with the circumstance of time, place, &c. they may be often relied on, though no general rule ever has or can be laid down on the subject.

Recital of lease for year.—In conveyances by lease and release, it was always usual to recite the lease for a year, which was done at the end of the granting clause, and though not absolutely necessary, was thus far important, that where the lease for a year was lost, it often afforded satisfactory

proof that such lease was actually made, and the release duly founded upon it. Hence the loss of a lease for a year that was recited in the release, which was a conveyance to the tenant to the *præcipe*, was held to be supplied by the statute 14 Geo. 2, c. 2, and that it was not unreasonable to presume, as the lease was recited in the release, and the parties were thus apprized of the necessity of a lease, that there was a lease. (*Holmes v. Ailsbie*, 1 M. & C. 551; see also *Skipwith v. Shirley*, 11 Ves. 64; *Ward v. Garmons*, 17 ib. 134.) In Ireland, it has been held sufficient simply to recite the lease for a year, no such lease being ever made (9 Geo. 2, c. 5, s. 6; 1 Geo. 3, c. 3); and the statute of 4 & 5 Vict. under which a lease for a year may now be dispensed with, enacts, that the recital or mention of a lease for a year in a release executed before the passing of that Act, shall be evidence of the execution of such lease for a year. In order, however, that a release should be effectual under that Act, it was requisite that it should appear on the face of it to have been made in pursuance thereof. This was sometimes done at the very outset of the deed: viz. "This indenture made in pursuance of an Act;" at other times the reference to the Act was made in the *testatum* clause; as, "the said A. B. doth by these presents, made in pursuance of an Act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties, &c." Conveyances under the subsequent Act of 8 & 9 Vict. c. 106, do not require any reference to that or any other Act. Some gentlemen still refer to the Act of 4 & 5 Vict.;

and others, adopting a kind of middle course, state the deed to be made "as well in pursuance as independently of that Act, &c." But the latter course being adapted to the existing uncertainty in the law, will, it is apprehended, soon grow out of use.

The testatum.—It is usual to express in the *testatum* clause the consideration for which the conveyance is made, the mode of expressing which must be governed by circumstances, so as to adapt the language of the assurance to the facts and intention of the parties. By the rules of common law no consideration is necessary to the validity of a deed, so that in conveyances of this kind the consideration is not necessarily inserted to give validity to the deed, but rather for the purpose of shewing that the purchase-money has been paid, as also to rebut the presumption of a resulting use or trust; or, to shew on the very face of the instrument that it was not voluntary, so as to be fraudulent against creditors or subsequent purchasers. For these purposes, therefore, it is now the universal practice to express the payment of the consideration-money in the body of the deed, as well as in the memorandum of receipt indorsed. At law such an acknowledgment in the body of the deed is conclusive; because a party who executes a deed is, as we have already seen, estopped from saying that the facts stated are not truly set forth; but the receipt indorsed has not this operation, because not being under seal, it is incapable of working an estoppel. (*Lampon v. Corke*, 5 B. & Ald. 606; 1 Dow. & Ry. 211.) Consequently, if the con-

sideration was not expressed to be paid in the deed, the vendor would not have been estopped by its being so expressed in the indorsed memorandum. But in equity, neither the acknowledgment of the receipt of the purchase-money, in the body of the deed, nor in the indorsed memorandum, will preclude the vendor from shewing that the money has not been so paid. (*Coppin v. Coppin*, 2 P. Wms. 284; *Macreth v. Symons*, 15 Ves. 337; *Hughes v. Kearney*, 1 Sch. & Lef. 132; *Grant v. Shallis*, 2 Ves. & B. 306.) But for all this, the indorsement and signature of receipt of the purchase-money should never be omitted; for although not conclusive evidence of such payment, its absence is implied notice that it has not been made, and that a lien in equity has attached on the lands in consequence. (2 Prest. Conv. 42; and see *antè*, vol. i. p. 97, *et seq.*) No consideration being necessary to pass an estate at common law, though it is to raise a use, a practice arose of omitting even a nominal consideration, in a disentailing deed, where it was intended to settle the property through the medium of the Statute of Uses, lest the enrolment should constitute it a bargain and sale enrolled, and to state merely that the assurance is for the purpose of barring the entail, &c. (*See the Form, Div. II. No. 22.*)

How the consideration should be expressed in the deed.—When a full and valuable consideration is paid, the receipt is usually expressed more fully than where the consideration is merely nominal: thus, for example, the consideration-clause, where the conveyance is made by the vendor and his dower

trustee, usually states "that in consideration of £ sterling paid ~~by~~^{to} the said vendor ~~to~~^{for} the said purchaser at the time of the execution hereof, the receipt of which the said vendor hereby acknowledges, and therefrom doth, by these presents, release the said purchaser, his heirs, executors, administrators, and assigns for ever; and also in consideration of 10s. at the same time paid by the said purchaser to the said dower trustee, the receipt whereof is hereby acknowledged, &c." This form is a shorter one than has been generally adopted for this purpose; still it seems that the more concisely (provided it be done correctly) the *testatum* clause can be penned, the more clearly will it tend to shew the objects effected by it.

Where the conveyance is by appointment and lease.—The above clause supposes the conveyance to have been by release; for if made by appointment and release, it would be requisite that a *testatum* should precede the one now given, by which, after setting forth the consideration of the purchase-money in the terms before mentioned, the vendor should appoint that the premises shall remain to the uses thereafter declared; and the second *testatum* should merely express a nominal pecuniary consideration to be paid by the purchaser to the vendor and dower trustee, in consideration of which the dower trustee releases, and the vendor grants, releases, and confirms. (*See the Form, Div. II. No. 1, Clauses 5, 6.*) Where there are other conveying parties, they must convey according to their respective interests. For example, in the case before instanced, of a sale by an heir-at-law and executors

of a deceased mortgagee under a power of sale contained in the mortgage, it should be expressed that in consideration of the purchase-money, setting out the amount paid by the purchaser to the executors, and of a nominal pecuniary consideration paid by such purchaser to the heir of the mortgagee, such heir, in respect only of his legal estate as heir-at-law of the mortgagee, should release and convey; the executors should remise, release, and quit claim; and if the owner of the equity of redemption is a party, he should grant, release, convey, and confirm. (*See the Form, Div. II. No. 10, Clause 6.*) The words "appoint" and "release" are sometimes mixed together in the same operative part, but which is always irregular, and sometimes materially wrong.

Conveyances by trustees.—Trustees have generally been advised not to convey by the word "grant," upon the ground that it creates an implied covenant; but this is not the case (as to which see *Park*, French edit. 26; *Noy*, Max. 261, 262, 9th edit.; *Co. Litt.* 348; *Butl. note to Co. Litt.* 425; *Nokes's case*, 4 Rep. 80); still the practice has been to omit the word "grant" in conveyances by trustees and persons acting in that character, such as executors and administrators, who are not interested in the purchase-money, mortgagees, annuitants, and other incumbrancers who have been paid off. (4 *Com. Dig.* 433, 2nd edit.) As to future conveyances, all cause of objection to the insertion of the word "grant" has been obviated by the recent Act 8 & 9 Vict. c. 108, by which, as we have already seen, it is expressly enacted that

no implied covenant shall arise in consequence of the word "give" or "grant," inserted in any deed made after the 1st of October, 1845; so that it seems a trustee would now have no right to decline to convey by the word "grant;" at the same time it does not appear that his assurance would have one whit greater effect by its being inserted than if the ordinary terms by which trustees usually convey were employed for that purpose; so that if the objection be raised, the matter really is not worth disputing about. In conveyances by a trustee, it is also a common practice to qualify his conveyance by the words "according to his estate and interest as such trustee as aforesaid;" but this is by no means essential to the protection of a trustee, who appears in that character on the very face of the conveyance, and who merely covenants that he has done no act to incumber the trust property.

Parties taking under the conveyance.—The conveyance should be to the parties who are to take under it. If the fee is to be conveyed, the grant should be to the party and his heirs. Persons taking by way of remainder are not named in this part of the deed; thus the name of the dower trustee, under the modern form of dower used, is now omitted; but when the more antiquated but now obsolete form of making the dower trustee and purchaser take as joint tenants was in use, then the conveyance was made to both, and it was declared in the *habendum* that the estate of the trustee was in trust only for the vendor. Where any of the parties take by way of use or trust, then the releasee to uses, trustees, or trustee only, should be named in this part of the

deed. Although it is the usual and most correct mode of proceeding to annex words of limitation to the granting clause when an estate in fee is to be conveyed, still this is here rather a formal than a necessary part of the assurance, where there is, as in every modern deed, an *habendum*; that being in point of law the proper part of the assurance for introducing the words of limitation; it being the office of the premises to name the grantee and describe the parcels, and of the *habendum* to limit the estate.

Where the purchaser is one of the conveying parties.—If the purchaser himself must necessarily be one of the conveying parties, as in the instance of a mortgagee purchasing the equity of redemption, (a) a direct conveyance to him would be improper; but this difficulty is easily gotten over by conveying through the medium of a trustee, and where the property is to be conveyed to dower uses, the dower trustee would be the proper party for the property to be conveyed to, which should be limited to such dower trustee and his heirs, *habendum* to him and his heirs, to such uses as the purchaser shall by deed appoint; and in default of appointment, to the use of the purchaser for life without impeachment of waste, with the usual limitation to the use of the dower trustee during the life of the purchaser, and with the ultimate remainder to the use of the purchaser, his heirs and assigns for ever. (*See the Form, Div. II. No. 6.*)

Disentailing deeds.—In disentailing deeds under

(a) That a mortgagee may so purchase, see *antè*, vol. i. p. 205.

the Fine and Recovery Substitution Act (3 & 4 Wm. 4, c. 74), a conveyance may, as we have already seen (*antè*, vol. i. 142), be made with the protector's concurrence without the latter departing with his interest; but which a tenant to the *præcipe* under the old system must have done. (*See the Form, Div. II. Nos. 22, 23.*) Hence in the case of a tenant for life, who is the protector of the settlement, concurring in the conveyance by the next immediate tenant in tail, but wishing to retain his own life-interest in the property, the *testatum* should express that the tenant in tail, with the consent of the protector, as such protector, &c. grants, &c.; the protector himself should neither grant, release, convey, nor even confirm, but his name should be inserted as the first party to the conveyance; his consent should be expressed in such conveyance, and then his hand and seal being placed to it will be conclusive. (*See the Form, Div. II. No. 22.*)

The parcels.—In describing the parcels care must be taken that the description is sufficiently descriptive, so as, on the one hand, to comprehend every part of the purchased property intended to be conveyed, and on the other hand, to exclude any portion that may be intended to be reserved to the vendor. At law, no more will pass than is well described, and, by the same rule, all that is described, and which the vendor has the power to convey, will pass. (2 Prest. Conv. 447.) But the rule is otherwise in equity, as that Court will rectify an error where any portion of the parcels have been by mistake omitted, or by decreeing a reconvey-

ance where more has been inserted in the conveyance than was the subject-matter of the contract (*Rob v. Butterwick*, 2 Pri. 190; *Thomas v. Davis*, 1 Dick. 301; *Young v. Young*, ib. 625; *Beaumont v. Bramley*, 1 Turn. 41); still it seems that is an equity attaching merely as between vendor and purchaser and their respective representatives, and does not affect the issue in tail or remainder-men, neither of whom it seems can be compelled to supply an omission of this kind.

Description should correspond with that contained in former deeds.—The description of the parcels in the deed of conveyance ought to correspond with that inserted in former deeds, so as to shew the identity of the lands throughout the title; unless where the property has been subdivided into parcels, when such a description must be necessarily improper. Whenever cases of this kind occur, Mr. Preston suggests that the new description should be as simple as possible, and that the attention should be directed to select those circumstances of description which will distinguish the property from any other, and to take the most obvious circumstances of certainty as the foundation and groundwork of the description: thus, "all that messuage, tenement, and farm called, situate, &c. which said hereditaments consist, &c. and were formerly the inheritance of, &c." (1 Prest. Conv. 447.) The advantage of adopting this mode, he observes, is, that the subsequent part of the description is independent of the former part of it, and therefore, though the subsequent circumstances of description may be erroneous, this error will not vitiate the

grant, since that which is certain of itself cannot be destroyed by that which is uncertain, false, or insensible ; in support of which the learned writer cites from Bacon's *Maxims* (Nos. 13 and 25), "*falsa demonstratio non nocet : nil facit error in nomine cum de personâ (or de se) constat. Veritas nominis tollit errorem demonstrationis.*" (See also Shep. Touch. 246 ; *Doe v. Greathead*, 8 East, 91.)

Where the conveyance is by trustees or mortgagees.—Sometimes trustees or mortgagees refuse to convey by any other description than that by which the lands were conveyed to them, lest they should render themselves responsible for passing more than was so vested in them ; but this apprehension seems groundless, particularly as qualifying words may be used so as to confine the lands in question to those originally conveyed to them.

Where distinct parcels are held under different titles.—It frequently happens that distinct parcels held under different titles are all included in the same deed. When such is the case, the parcels may be described in the order in which they are mentioned in the recitals,—as first, "all, &c.:" and then, after describing the parcels, may be added, "all which said hereditaments and premises are comprised in and described by the said hereinbefore recited indenture, &c." Secondly, "all, &c." referring in like manner to the recital relating to it, and so through all the remaining parcels. Where, however, the parcels are very numerous, the plan laid down by Mr. Preston appears to be a most neat and accurate mode ; which is, to insert the parcels comprised in each class of deeds in a

distinct schedule, and to make a reference, from time to time, in the recitals, and also in the grant, to the appropriate schedule ; thus the recital will be to this effect :—"Whereas, by indentures, &c. all &c. which are described and comprised in the first schedule to these presents, with their appurtenances, were conveyed, &c." Or when the circumstances require it, the recital may assume this form,— "Whereas, by indenture bearing date, &c. divers hereditaments, and amongst them all those, &c. comprised in the first schedule to these presents, were conveyed, &c." The other recitals can be expressed in similar terms, adapting, of course, the recital to the circumstances. The grant must be by words of reference to the description in the schedules, and will be governed by the intention of the parties. In general it will be to the following effect :—"All those messuages, &c. which are comprised and described in the first, second, third, and fourth schedules to these presents." (*See the Form, Div. II. No. 35.*) If the general words be added to each parcel in the schedule, then the reference will be to the rights, members, and appurtenances by general words : thus, viz. after the words, "every part and parcel of the same," add, "with the rights, members, and appurtenances ;" but when, as is the more frequent practice, the general words are not inserted in the schedule, they should be introduced in the body of the deed, in the same form as if the description of the parcels had been there inserted, instead of being contained in the schedules. (1 *Prest. Conv.* 458.)

Where freehold and copyholds lie intermixed together.—If freehold and copyhold lands are intermixed together, and such are the subject-matter of conveyance, every care must be taken not to include the copyholds in the operative part of the grant; though instances sometimes occur where it is impossible to avoid this, from the inability to distinguish with any degree of accuracy what portions of the lands are actually freehold and what copyhold. To obviate this difficulty, it has been suggested that the grant itself should be of all such and so many and such parts as are of freehold and not of copyhold tenure, of and in all, &c. adding a full description of all the parcels, including the freehold and copyhold lands, or inserting such parcels in a schedule annexed to the deed. (See 2 Prest. Conv. 458.)

Parcels, how usually set out in appointments and assignments.—In appointments made in exercise of a power, the description of the parcels is often inserted in the recital of the instrument creating the power; the general words, also, are usually curtailed, being commonly restricted to the terms "with the appurtenances, or with the rights, members, and appurtenances thereto belonging," and the reversion clause, all estate clause, and grant of deeds, are usually omitted. In assignments of leasehold property, it is also very common to describe the parcels in the recital of the deed by which the term was originally created; and where the conveyance is by trustees or mortgagees, the parcels are sometimes inserted in the recital of the deed creating the trust or mortgage. But in most other

instances the parcels are inserted in the operative part of the deed.

How property not intended to pass should be excluded.—When the parcels under a general denomination are calculated to pass more lands than are the subject-matter of contract, it will be necessary to except the latter in express terms out of the conveyance. This exception can only be made to the grantor, or rather it cannot be made to a stranger; and if no name be mentioned, but the property be merely excepted, the grantor will be entitled to it during his estate in the premises. (Shep. Touch. 100.) If, however, the exception be only made to him during his life, it will be severed only during that period, and on his death revert to the purchaser. (*Ib.*) Where an exception is most frequently employed, is where there is a grant of manor, and some of the demesnes are to remain the property of the grantor, or are to be conveyed to other persons. (2 Prest. Conv. 462.)

Of the general words.—After the description of the parcels, were usually added such general words as might be supposed to cover any thing omitted in the description; but, generally speaking, the simple term “appurtenances” would have included every thing they enumerated. Then came the reversion clause, which was considered rather a formal than a necessary part of the conveyance; then the all estate clause, but which was of course omitted in all well-penned instruments, where a particular estate only was intended to pass, and was also inapplicable to the character of a feoffment, though often inserted therein, livery being made of

the possession and not of the estate of the feoffor. Now, under the recent Act, 8 & 9 Vict. c. 106, but which seems merely explanatory of the law as it stood previously, it is enacted "that every such deed, unless any exception be specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the lands therein comprised belonging, or in anywise appertaining, or with the same demised, held, used, occupied, and enjoyed, and taken or known as part or parcel thereof, and also of the reversion or remainders yearly, and other rents, issues, and profits of the same lands, and of every part and parcel thereof; and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim, and demand whatsoever, both at law and in equity, of the grantor in, to, out of, or upon the same lands, and every part and parcel thereof, with the appurtenances." (Sec. 2.)

Grant of all deeds.—The concluding clause of the premises is the grant of all deeds. This, it seems, is not absolutely necessary to entitle the purchaser to the custody of the documents relating to the title, as it seems they will pass to him as incidental to his purchase, unless the vendor retains part of the estate, or has entered into qualified covenants for the production of them to a third person (*Field v. Yea*, 2 T. R. 608); or, according

to the old authorities, where a feoffor has entered into a general warranty, who in that case would, it is said, be entitled to retain the deeds in order to enable him to defend the title he has thus warranted. (Co. Litt. 6.) Mr. Jarman has, however, suggested that, notwithstanding the purchaser will, unless in the excepted cases above noticed, be entitled to the custody of the title-deeds, independently of any express grant of them, still it will be the better plan to insert the clause granting them expressly to the purchaser, and so avoid the possibility of any question from being raised upon the subject,—particularly as it has been questioned whether, when a conveyance takes effect under the Statute of Uses, the right to the custody of the deeds resides in the a releassee to uses, or passes with the land to the *cestui qui use*. In order, however, to accomplish this where the property is conveyed through the medium of a trustee to uses, he observes that it will be necessary to remove the grant of deeds from its usual position, and insert a distinct and separate clause for that express purpose. (See 7 Jarm. Byth. 461.)

Where the title-deeds are not delivered to the purchaser.—When the title-deeds are retained by the vendor, the usual practice is for him to enter into a covenant to produce them, and a Court of Equity will never decree a specific performance if the vendor refuses to do so. (*See the Form, Div. II. No. 15, clauses 5, 6, 7; ib. No. 16.*) In the absence of an express stipulation to the contrary, the vendor is, as we have already seen (vol. i. pp. 6, 31), compelled, at his own expense, to supply

the purchaser with attested copies where he cannot obtain the deeds themselves ; still it seems that will not extend to every document relating to the property, but to include such only as are necessary to make a good title. Nor does the rule apply to instruments of record, for these the vendor cannot be compelled to be at the expense of supplying.

Of the habendum clause.—The office of the *habendum* is to limit the estate of the grantee. It commences with the words “to have and to hold the parcels” (enumerated by words of reference, but which should be sufficiently comprehensive to embrace the whole property) to the grantee and his heirs to whose use the property is declared to be, or other uses are declared to arise out of his seisin. If no express use is declared, it will result back to the grantor (see vol. i. p. 341, and the cases there referred to), unless there be a sufficient consideration to rebut the resulting use, in which case the estate limited to the grantee will remain in him. (7 Jarm. Byth. 456.) It must also be recollected that where any greater estate than for the life of the grantee, that the proper words of limitation are inserted for that purpose.

Limitation of uses.—In modern conveyances to purchasers, the property is usually limited either simply to the grantee in fee, or to dower uses. When the former course is adopted, the usual words are, “To have and to hold the said messuages, &c. unto the said A. B. and his heirs, to the only proper use and behoof of the said A. B. his heirs and assigns for ever,” or, “To have and to hold, &c. unto and to the use of the said A. B. his heirs and

assigns for ever ;" but either form will have the same operation.

Uses to bar dower.—The right of dower which formerly attached on a conveyance of lands, and which in fact still does as to husbands married previously to the year 1834, being found a clog upon the free alienation of property, it was deemed expedient to adopt some plan by which this impediment might be removed. The first method resorted to (and though now obsolete, has not very long been discontinued) was to limit the estate to the purchaser and his trustee as joint tenants in fee, but declaring that the latter only held as a trustee for the purchaser, by which means the wife's dower was prevented from attaching during the continuance of the joint estate of the purchaser and his trustee (Litt. s. 45 ; Co. Litt. 37, b ; Bro. 4, 84 ; Perk. 334 ; *Broughton v. Bandall*, Cro. Eliz. 502 ; *Amcoth v. Catherick*, Cro. Jac. 615 ; *Sneyd v. Sneyd*, 1 Atk. 442) ; but it was still liable to attach on the death of the trustee in the husband's lifetime, as the husband would then have become solely seised. The inconvenience resulting from this gave rise to the practice of limiting the lands "to the purchaser and his trustee, and the heirs of the trustee," or immediately to the trustee and his heirs, in trust for the purchaser and his heirs (*Curtis v. Curtis*, 2 Bro. C. C. 620), in both of which cases the legal seisin of the husband was prevented by the creation of the trust ; but notwithstanding the last objection was obviated by this mode, it was still open to other objections. It kept the legal estate from the purchaser, and ex-

posed him to the possibility of its escheating to the Crown for want of heirs of the trustee, or to the inconvenience of its becoming vested in infants, married women, or persons residing at a distance not easily discoverable, or not willing to join in the conveyance required to be made of it. (Co. Litt. 379, *b*, n. 1.) To prevent all these troublesome consequences, therefore, a mode of limitation was next introduced by which a right of dower was permitted to attach upon the estate, but subject to be divested by the act of the husband in his lifetime. This was effected by limiting the property to such uses as the husband should appoint, and in default of appointment, to the use of his right heirs. (Co. Litt. 216, *a*, n. 2.) Until this power was exercised by the husband, he was actually seised of an estate of inheritance in possession on which the right of dower attached; but upon his making the appointment, it was considered that as the appointee came in as if named in the deed creating the power, he was in paramount to the right of dower in the wife, and consequently held the estate discharged from her claims thereto. Considerable doubts, however, appear to have been at one time entertained as to the efficacy of this mode of limitation, upon the principle that the right of dower having once attached, could not be defeated by the act of the husband alone. (*Cor v. Chamberlain*, 4 Ves. 637; *Maundrell v. Maundrell*, 7 ib. 567.) It has, however, been since decided that the husband, by exercising his power, can wholly bar his wife's claim to dower. (*Maundrell v. Maundrell*, 10 Ves. 246; *Rae v. Pung*, 5 B. & A. 561; S. C. 5 Madd.

561; *Moreton v. Lees*, cited 5 Madd. 318; *Doe v. Jones*, 10 B. & C. 459.) Still this mode of limitation is not always to be depended on. The power of appointment is liable to be suspended and destroyed, and as its existence is the only circumstance which precludes the wife from her dower, there must always be a possibility of danger (though perhaps sometimes so small as scarcely to deserve attention) in taking a title which depends upon it. (Co. Litt. 216, *b*, *a*, n. 2.) At length a method was found out by which all the advantages of the former modes were secured, and all the inconveniencies removed. This was the present form of dower uses now commonly inserted in conveyances, by which the property is limited to such uses as the purchaser shall appoint (which gives him a power of disposition over the whole fee, which if he exercises, the appointee will be in under the original conveyance, and so paramount to the claims of the wife), and in default of appointment to the use of the purchaser for life, with remainder, in case of the determination of the purchaser's life-estate, ~~to~~ to his dower trustee during the life of the purchaser, with the ultimate remainder to the husband in fee, which ultimate remainder, by the interposition of the limitation, is an estate in remainder, upon which no right of dower in the wife could possibly attach. (Butl. Note to Co. Litt. 379; Fearn, C. R. 347. (*See the Form, Div. II. No. 1, clause 6.*))

How dower uses should be framed.—In uses to bar dower, the lands are sometimes limited to such uses as the purchaser shall, by deed sealed and delivered by him in the presence of and attested by

two or more credible witnesses, or by his last will or testament in writing, signed and published by him in the presence of a specified number of witnesses, appoint. One of our most celebrated text-writers, however, very properly observes that no good reason can be assigned for requiring any specific number of witnesses to the execution of the deed by which the power is executed, it being quite sufficient to state that the power is to be executed by deed generally. It is also unnecessary to extend the power to testamentary dispositions, for, as the will does not take effect until the purchaser's death, when the trustee's estate ceases, the power is not wanted for the purpose of overriding his estate; and the interposed estate of the trustee prevents the dower from attaching at all during the life of the purchaser, so that both his heir and devisees would take exempt from the dower. The power of devising by will, Mr. Butler continues to observe, is therefore useless; but it is attended with this inconvenience, that it sometimes gives rise to nice questions whether the disposition operates as a devise of the land, or as an appointment of the use, and thus makes it doubtful in whom the legal estate is vested. For this reason, he says, it seems advisable to omit wholly out of the clause the power of devising by will. (See Butl. Note to Fearn, C. R. 437.) The earlier practice in framing limitations of this kind was to limit the interposed estate to the dower trustee and his heirs, but the modern one generally is to make the limitation to his executors and administrators, it being in general more easy to find and obtain the concurrence of a personal representative than an heir, the former of

whom are also less liable to be labouring under legal disability, though, as such estates are not often required to be conveyed, little practical inconvenience is likely to result for want of the concurrence of either the dower trustees or his representatives, so that it is not very material what mode of limitation is annexed to his estate. With respect to the ultimate limitation, Mr. Butler suggests (see his note to Fearn, C. R. 438), that as a life-estate is first limited to the party, it seems more accurate to limit the fee to his heirs and assigns, and not to the party, his heirs and assigns. This Mr. Hayes pronounces to be at once theoretically wrong and practically dangerous, depending, as he truly observes, upon the rule in *Shelley's* case, which in some instances might not be applicable, particularly in the case of limitations differing in quality, as where the one is legal and the other equitable. In most modern conveyances we certainly find a preference given to the limitation to the purchaser, his heirs and assigns, to the form recommended by Mr. Butler, though, as far as conveyances to purchasers are concerned, it can rarely happen that the latter may not be safely adopted.

Limitations to bar dower less requisite than formerly.—Dower uses are not so necessary now as formerly, because, since the Dower Act, 3 & 4 Wm. 4, c. 105, all men unmarried previously to the year 1834 may, as we have already seen, debar their wives of their dower by conveying away the property, which, unless protected by dower uses, the husband could not have done previously; nor will the dower uses be sufficient to exclude a

widow married after 1834, but which may nevertheless be effected by a declaration made by him and inserted in the purchase-deed, and which is usually done immediately after the limitation of the uses. (*See the Form, Div. II. No. 1, Clause 6.*) And where a purchaser has been married previously to 1834, the usual plan is to limit the lands to dower uses, so as to bar the dower of the present wife, and to superadd a declaration to bar the dower of any other woman with whom he may happen to intermarry at any future time. It has, indeed, been suggested that even if limitations to bar dower should be rendered unnecessary by the Legislature, the power of appointment should still be retained on account of the facilities it affords for acting on the ownership by a single instrument, and for the protection it allows against judgments; but the latter it will now only do in favour of a purchaser who has no notice of them, which has reduced this protection within far more narrow limits than formerly. (Stat. 1 & 2 Vict. c. 110.) Still the clause confers sufficient advantages to allow it to retain its place in purchase-deeds. The protection it affords to purchasers, without notice against incumbrances, is an advantage as far as it goes, and the power of conveying by appointment may often prove exceedingly convenient, particularly in small purchases, where the saving of the stamp-duty on the lease for a year may be in some degree important.

In what instruments the habendum clause should be omitted.—There are certain assurances in which the *habendum* clause would be repugnant to the

very nature and operation of the instrument; and in such case should always be omitted. This occurs in releases which operate by way of extinguishment, and not of enlargement, or surrenders which destroy the estates, in either of which assurances a clause declaratory of the object of the instrument should be substituted for the *habendum*.

Covenants.—Generally speaking, a vendor of real property can only be required to enter into qualified covenants that he is seised in fee, has good right to convey, for quiet enjoyment, freedom from incumbrances, and for further assurance. Where, however, a vendor takes by descent, or derives his title through a will, the purchaser is entitled to have the covenant extended to the acts of the vendor's ancestors and testators; for if restricted to the acts of the vendor and those claiming under him, though this covenant would comprehend a claim of his own wife to dower, it would not include a similar claim of the widow of a preceding ancestor or testator, or in fact any other incumbrances attaching on the property through the acts, deeds, defaults, privity, or procurement of such ancestor or testator. In case also the vendor retains the title-deeds, the purchaser will be entitled to a covenant for their production, and to furnish copies, extracts, or abstracts of the same. A covenant of this kind may be included either in the purchase-deed (*see the Form, Div. II. No. 15, Clauses 5, 6, 7*), or be entered into by a distinct and separate instrument. (*See the Form, Div. II. No. 16.*) When contained in the purchase-deed, it usually comes in at the end, and is preceded by a short recital that the deeds

and writings contained in the schedule thereto annexed relate as well to the title of the property thereby conveyed, as of certain other property of the vendor, who is to retain the deeds on entering into the covenant for their production. If the covenant is contained in a separate deed, the conveyance to the purchaser should be first of all recited, and then should come the recital that the vendor is to retain the deeds. A slight variation will, however, be requisite where the title-deeds, instead of being retained by the vendor, are handed over by him to a purchaser, who covenants for their production. The late Fine and Recovery Substitution Act (3 & 4 Wm. 4, c. 74) has also introduced a new covenant into purchase-deeds, which, where the circumstances call for it, must be considered as a usual one, and one which a purchaser has a right to have inserted in the conveyance,—and this is, that the deed shall be duly acknowledged by the vendor's wife, in pursuance of that Act. This covenant is generally inserted immediately after the limitation of uses, and preceding the covenants for title. (*See the Form, Div. II. No. 7, Clause 7.*) As a married woman is incapable of entering into a covenant, her husband, where she is a conveying party, should covenant for her. Where the conveying parties who are to covenant for title are numerous, and when brevity is desired, instead of going through the whole string of their names, it will be sufficient to describe them as the parties thereto of the first, second, third, fourth, and fifth parts, as the case may be, and if any of such parties are married women, a covenant from their husbands for them

should be added shortly in the following terms: "such of them as are married covenanting for their respective wives, &c." (*See the Form, Div. II. No. 20, Clause 5.*)

Covenants by trustees, mortgagees, heirs-at-law, executors, &c.—Trustees, mortgagees, heirs-at-law, executors, and administrators, when they convey or concur in the conveyance in those characters, can only be required to enter into covenants that they have done no act to incumber (*see the Forms, Div. II. No. 3, Clause 7; ib. No. 10, Clause 7; ib. No. 26, Clause 7*); but heirs, executors, or administrators, who take also a beneficial interest in the property conveyed, will, like other vendors, be bound to enter into the usual qualified covenants for title.

Vendor when entitled to covenant for indemnity.—Where a mortgagor sells his equity of redemption, he is entitled to a covenant of indemnity from the purchaser, by which the latter covenants to pay the mortgage-money, and to indemnify the vendor from all claims in respect thereof. (*See the Form, Div. II. No. 4, Clause 8.*) In assignments of leaseholds, also, the assignee must covenant to indemnify the vendor from the covenants contained in the original lease, the further consideration of which we must defer until we come to treat of assurances of property of that description.

With whom the covenants should be entered into.—We must now proceed to consider who will be the proper parties to enter into the covenants. To arrive at the right conclusion, the limitations in the *habendum* will be the proper guide to

go by. If the limitation is direct to the purchaser, as unto and to the use of A. B. his heirs and assigns, or to dower uses for his benefit, then A. B. will be the party with whom the covenants should be entered into (*see the Form, Div. II. No. 1, Clause 8*); but if the limitation had been to J. S. and his heirs, to the use of A. B. his heirs and assigns, then J. S. would have been the party who should be the covenantee (*see the Form, Div. II. No. 6, Clause 6*); for, although the seisin of J. S. is merely transitory, for the purpose of serving a use, and his estate is divested the same instant it takes place, still, as he is the person who takes the first actual estate in the land, in order that the covenants may become annexed thereto and continue to run therewith through all the subsequent modifications which such land may undergo, he is the right person to be the covenantee, although the very next instant it passes over to the party in whom the use is executed. (*Roach v. Wadhams*, 6 East, 289; see also 7 Jarm. Byth. 514.) In penning covenants of this kind, the same terms of limitation should be annexed to the name of the covenantee as in the *habendum*; as, for example, if the limitation is direct to A. B. his heirs and assigns, then the covenant should be expressed to be with him, his heirs and assigns; but if limited to J. S. and his heirs, to the use of A. B. &c. then it would be more correct for the covenant to be with J. S. and his heirs alone, thus agreeing with the *habendum* and the character in which he stands with respect to the conveyance.

. *Copyholds*.—When copyholds are alone the sub-

ject-matter of the purchase, a deed of covenant for title should accompany the surrender, as it is not the practice to insert covenants of this kind on the court rolls. (*See the Form, Div. II. No. 33.*) This deed requires only the common deed-stamp, the *ad valorem* duty on the purchase-money being charged on the surrender. Another mode, and which upon the whole seems to be the better plan, is, for the vendor to enter into a covenant to surrender, with a declaration of trust in favour of the purchaser, to which the covenants for title are added. (*See the Form, Div. II. No. 32.*) When, however, the latter course is adopted, it may be prudent in some instances for the purchaser to ascertain that the surrender is perfected before he pays his purchase-money, as a mere covenant to surrender confers no more than an equitable estate, which the vendor himself might by possibility defeat by surrendering to a third party, who, if he had no notice of the previous deed of covenant, or of the former purchaser's title, would be entitled to the benefit of the legal estate, and thus it is possible that such former purchaser might lose the property altogether. (See 7 Jarm. Byth. 332 ; 7 *ib.* 504, 505.)

When copyholds are included in the same conveyance with other kinds of real property.—When copyholds are included in the same purchase-deeds with other kinds of real property, the uses of the copyholds may be declared either in the same deed of conveyance or by a distinct assurance. In some instances the latter mode is preferable, as the Stamp Act (55 Geo. 3, c. 184) provides that where any lands or other property of different holdings,

or held under different titles, contracted to be sold at one entire price for the whole, shall be conveyed to the purchaser in separate parts or parcels, *by different deeds or instruments*, the purchase or consideration money shall be apportioned in such manner as the parties shall think fit; so that a distinct price or consideration for each separate part or parcel may be set forth in or upon the principal deed or only instrument of conveyance relating thereto. By adopting a judicious apportionment, as Mr. Coventry suggests in his note to 2 Wat. Cop. 219, the stamp-duty may be considerably reduced. Thus, for example, the stamp-duty on 12,500*l.* is 130*l.* whilst that on 12,450*l.* is 110*l.* and on 50*l.* it is 1*l.* 10*s.*; so that, by apportioning the purchase-money in this manner, a saving of 28*l.* 10*s.* may be effected. (*See the Form, Div. II. No. 36.*)

How a mixed assurance should be framed.—When freeholds and copyholds, or lands of any other tenure, are contained in the same deed,—as, for example, freeholds, leaseholds, and copyholds,—the recitals relating to the freeholds should come first, then those relating to the leaseholds, and, lastly, the recitals affecting the copyholds. The same course should be pursued in the granting clause, by which the freeholds should be granted and released, the leaseholds assigned, and the copyholds be covenanted to be surrendered at the next court, with a declaration that the vendor will in the meantime stand seised or possessed of the same in trust for the vendor; but, if already surrendered, then the uses of the surrender only should be declared in

the purchase-deed. The covenants for title of the freeholds and copyholds may be blended together, as, viz. that the vendor has good right to release the freeholds, to assign the leaseholds, and to surrender the copyholds, for quiet enjoyment of each, freedom from incumbrances, and for further assurance. (*See the Form, Div. II. No. 35.*)

Assignment of leaseholds.—In the assignment of estates for years, it is a very usual practice to describe the parcels in the recital of the deed creating the term, and that by virtue of divers meane assignments, &c. and ultimately by the last assignment the term is vested in the assignor. This form is well adapted for general purposes, but where the property has undergone any important alteration subsequent to the creation of the term, so that the original description would not be strictly applicable to it,—as where the demise was of a close of land, which has subsequently been built upon,—the parcels should be so described as to correspond with these changes, and instead of being included in the recitals, should be set out in the parcels clause. The operative words usually employed on an assignment are, “grant, bargain, sell, assign, transfer, and set over.” The terms “bargain,” and “sell” are, however, inapplicable in the assignment, though proper in an original demise where it is intended to confer the possession under the Statute of Uses; but the statute has no application to the assignment of terms, and therefore it would be more correct to omit those expressions altogether. The strongest and most apt term is the word “assign;” the words “trans-

fer and set over" would, however, have the same operation; but when the most forcible term is employed, there can be no necessity of superadding other terms which can have no possible further effect and operation. The all estate clause has been generally inserted in assignments, although it would be improper where the assurance instead of an assignment is intended to operate as an underlease: but though incorrect, it might nevertheless be controlled by the *habendum*. (*Derby (Earl of) v. Taylor*, 1 East, 502; see also *antè*, vol. i. pp. 246, *et seq.*) The *habendum* should limit the premises to the purchaser for the residue of the term, but subject to the rents and covenants (if any) contained in the original lease. The vendor should enter into qualified covenants for title, viz. that the lease is a good subsisting lease, that the reserved rent has been duly paid, and that all the covenants on the part of the lessees have been duly performed; that the assignor has power to assign, for quiet enjoyment, according to the terms of the lease, freedom from incumbrances, and for further assurance. (*See the Form, Div. II. No. 29, Clause 7.*) If the assignor is the original lessee, then the purchaser is bound to covenant to pay the reserved rent, and observe and perform the covenants contained in the lease, and to indemnify the assignor therefrom (*see the Form, Div. II. No. 29*); and this a purchaser of property of this nature is bound to do without any stipulation whatever to that effect: in fact, nothing but an express stipulation can protect him from being compelled to do so. (*Pember v. Mathers*, 1 Bro. C. C. 52;

Staines v. Morris, 1 Ves. & Bea. 8; *Wilkins v. Fry*, 1 Mer. 244.) But if, on the other hand, the vendor himself is only an assignee of the term, then the purchaser need not enter into any covenant of the kind, which, in a case of this nature, would be wholly uncalled for; because, as an assignee, the vendor is only liable to the rents and covenants during the continuance of his estate and interest in the premises, which necessarily ceases on his assigning over such interest to a third party, and there being therefore no longer any liability, there is nothing left to indemnify him from. (See *antè*, p. 58, and the cases there referred to.)

Not generally advisable to include estates for years in the same deed with freehold estates.—It is not, generally speaking, advisable to include estates for years in the same deed with freehold estates; because, on the decease of the owner of the respective properties, they would devolve upon different representatives, and be transmissible in a different course, when some difficulty and inconvenience might arise with respect to the possession of the title-deeds.

Where part of the purchase-money is to be allowed to remain on a mortgage of the property.—It sometimes happens that part of the purchase-money is agreed to be permitted to remain on mortgage of the property sold. This object may be accomplished by a separate deed, or it might be included in the deed of conveyance; but in either case the same *ad valorem* duty will attach,—that is, the duty must be paid on the whole purchase-money, and also on the whole sum expressed to be secured

by way of mortgage. When both mortgage and sale were comprised in the same deed, the old practice was to create a term of years for that purpose, which was limited to the vendor by way of mortgage, and to limit the inheritance to the purchaser; but the practice now seems to be, to reassure the fee to the vendor for that purpose, a form of which is supplied in the Appendix. (*See Div. II. No. 5.*) The deed, after reciting such matters as may be necessary to shew the relation of the parties, should recite the contract for sale and the agreement that a portion of the purchase-money is intended to remain on mortgage; the parcels should then be conveyed to the purchaser, to hold to him and his heirs to the use of the vendor, the intended mortgagee, in fee, subject to redemption and reconveyance on payment of the mortgage-money, with qualified covenants for title by the vendor to the purchaser, and with general covenants from the purchaser to the vendor for payment of the residue of the purchase-money, and for title, concluding with a covenant from the vendor that the purchaser shall enjoy until default. Powers of sale can be superadded to the redemption clause if required. The above mode of assurance may, with a slight variation, be adapted also to a sale and mortgage of copyholds. To accomplish this the purchased copyholds should be surrendered to a mutual trustee, in fee, in trust for the vendor, his heirs and assigns, subject to a proviso for redemption on payment of the sum secured by mortgage, and then the vendor should enter into qualified, and the purchaser into general covenants, as in the case of freeholds.

Disentailing deeds and acknowledgments of married women.—Before dismissing this part of our subject it will be proper to offer a few observations on the preparation of disentailing deeds and acknowledgments of married women, two modes of assurance which, as we have already seen, have been recently substituted in the place of fines and recoveries. (See *antè*, vol. i. pp. 135, *et seq.*) In framing a disentailing assurance, when simply for the purpose of barring an entail, no recitals are necessary; but it is usual to introduce them when, in addition to barring the entail, the instrument is also employed as a deed of conveyance to the purchaser. In the latter instance the assurance creating the entail should be recited, and the state of the title should be disclosed by the subsequent recitals.

For example, suppose a settlement to have been made previously to, and in contemplation of, the marriage of the father and mother of the tenant in tail, by which the property is limited to the father for life, remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of the marriage in tail, with divers remainders over, with the ultimate reversion to the father in fee, and the father having died, his eldest son becomes tenant in tail, and is desirous of barring such entail and acquiring the fee. The marriage settlement should first be recited, then the marriage, next the death of the father, the tenant for life, then what issue he left, and that the tenant in tail has attained his majority, and has contracted to sell the entailed property.

Where the protector consents to the assurance.

—If the estate tail is to be barred with the consent of the protector of the settlement, who takes a preceding life estate under it, which is intended to pass under the assurance, after introducing such recitals as are necessary to bring down the history of the time of settlement to the time of the assurance, it should be recited that the protector and the tenant in tail are desirous that the entail should be barred and the property limited in fee-simple in manner thereafter mentioned. The protector and tenant in tail should then, according to their respective interests in the premises, grant and release to the releasee, *habendum* to the releasee and his heirs, to the intended uses. If the protector only consent, but does not depart with his estate, then it will be sufficient to state that the tenant in tail grants, with the consent of the protector, and releases, &c. the protector's assent being sufficiently testified by the recital and his execution of the deed. In case the protector refuses his consent, the tenant in tail may still bar the entail so as to pass a base fee, which is capable of confirmation by him when there ceases to be a protector of the settlement, and which he may covenant to do at that time. (*See the Form, Div. II. Nos. 25, 26.*) An estate tail may be barred either in the deed of conveyance to the purchaser, or by a distinct instrument; but the latter mode is generally preferred, unless the conveyance is a very short one, on account of the additional expense which would be incurred in enrolling a lengthy deed.

Enrolment and registration.—In disentailing

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deeds and all instruments requiring enrolment, this should be done immediately after the execution; and where registration of an assurance is requisite, no time should be lost in doing this, otherwise another having claim on the property might gain a priority, and it is also possible that a vendor might sell or take up money on a mortgage of the property to a *bond fide* purchaser or mortgagee, either of whom, if unaffected by notice, were he to register his conveyance first, would wholly supersede the former purchaser.

Execution and attestation.—The execution and attestation of documents have been treated upon in the preceding volume (pp. 376, 383), to which we refer the attention of our readers.

CHAPTER IV.

REMEDIES FOR BREACH OF CONTRACT.

I. WHEN THE CONTRACT MAY BE RESCINDED.

II. REMEDIES FOR BREACH OF CONTRACT AT LAW.

1. *As to the Vendor.*
2. *As to the Purchaser.*

III. REMEDIES IN EQUITY.

SECTION I.

WHEN THE CONTRACT MAY BE RESCINDED.

WE have hitherto treated on the progress of a sale of real property through all its intermediate stages from the time of entering into the contract to the execution of the conveyance; therefore it now remains for us to consider what steps are to be taken when the contract is either annulled by consent of the parties, or any impediment arises which hinders it from being specifically performed.

Of rescinding the contract.—An agreement to purchase real property may be rescinded at any time before its completion by the mutual consent of the parties concerned, and upon this a question rarely arises. Where the difficulty occurs is where one party wishes to be off his bargain, and the other

wishes to hold him to it; and then it becomes a very important question whether or not the agreement may be annulled, or a performance of it specifically enforced. The usual ground for annulling the contract on the part of the purchaser is the inability of the vendor to make a good title; and on the part of the vendor, that the purchaser is not ready to complete his purchase within the time prescribed by the contract, or has by his laches precluded himself from any right to insist upon a specific performance by the vendor.

Where time is made the essence of the contract.

—Time may now be made the essence of the contract in equity as well as at law (see vol. i. p. 105, and the cases there referred to); and where the contract or conditions of sale are so penned as to have this operation (see *the Form in the Appendix*), the vendor will, immediately upon breach of such condition, be entitled to annul the sale, resell the property, and recover the deficiency and all incidental expenses from the purchaser, and will also be entitled to retain the overplus money in case the proceeds of the second sale should exceed the original purchase-money (*Merlins v. Adcock*, 4 Esp. N. P. C. 251; *Moss v. Mathews*, 3 Ves. 276; *Ex parte Hunter*, 6 ib. 95; *Bowles v. Rogers*, ib. cited); in addition to which, he may bring his action at law for damages, or file his bill in equity for a specific performance.

Where time is not made the essence of the contract.—Where time is not originally made part of the essence of the contract, it seems doubtful if any subsequent notice or intimation of the parties can

render it so. In *Reynolds v. Nelthorpe* (6 Mad. 18), Sir John Leach, V. C. said, that it may now be considered the settled doctrine of the Court, that by the terms of the agreement time may be made the essence of the contract. It has not, however, been decided that where there is no stipulation in the contract, time may be made essential by subsequent notice; and he added, that in the case then before him, he should leave that point untouched. Neither, it seems, has it ever been determined how long a period may be permitted to elapse, where time is not the essence of the contract, before it will afford sufficient ground for rescinding the contract by one party on account of nonperformance by the other. Thus much, however, appears certain, that equity will assist no one who has not shewn himself desirous, prompt, eager, and at all times ready to complete his bargain (*Wingfield v. Whaley*, Vin. Abr. tit. "Contract," c. 36; Dom. Proc. 13 March, 1722; *Hayes v. Caryl*, Dom. Proc. 26 Jan. 1702, mentioned in Grounds and Rudiments of Law and Equity 18; 1 Mad. Pract. 416; *Milward v. Thanet (Earl of)*, 5 Ves. 720, n.; *Hertford (Marquis of) v. Bone*, 5 Ves. 720, n.; *Newman v. Rogers*, 4 Bro. C. C. 391; *Moore v. Blake*, 1 Ball & B. 62; *Ormond (Lord) v. Anderson*, ib. 370; *Alley v. Deschampes*, 13 Ves. 228); for a court of equity always discountenances laches and neglect. (*Lloyd v. Collet*, 4 Bro. C. C. 469; *Alley v. Deschampes*, *suprà*.)

Usual grounds for annulling sale by purchaser.
—The usual grounds assigned by a purchaser for rescinding a contract are, either that the vendor has

not the interest he pretended to sell ; that the property has been misdescribed ; that there is a defect in quantity of the estate ; that there was a total or partial failure of consideration, or material alteration, in the property subsequent to the contract ; or, an inadequacy of consideration.

Where the vendor has not the interest he pretended to sell.—Where the vendor has not the interest he pretended to sell, as where he contracts to sell a freehold estate, which turns out to be leasehold, it will afford sufficient ground for the purchaser to rescind the contract in equity as well as at law, whilst, at the same time, a court of equity will allow him, if he thinks proper, to insist upon the vendor's completing the purchase, and allowing an abatement of purchase-money to make up for the difference in value between the property contracted for, and the interest which the vendor really has in it. In cases of this kind, therefore, the purchaser may either hold the vendor to his bargain or annul the sale, but the vendor can do neither. Nor is it even necessary to shew fraud on his part ; for it will make no difference even if it should appear that he himself may have been deceived as to the true nature of the property he proposed selling. (See vol. i. p. 21, *et seq.*) But in certain cases, where the misdescription is not in the tenure, but in the duration of interest ; as where a vendor contracts to sell a term of twenty years in certain premises, and it should turn out that he had only eighteen or nineteen years unexpired, although this will afford sufficient cause for totally annulling the agreement at law, yet in

equity, where there is no great difference between the duration of interest pretended to be sold and that which the vendor actually has in the property, a specific performance will be decreed with a compensation. (See vol. i. pp. 25, 26.) It seems difficult, however, to lay down any rule as to what degree of deficiency would be sufficient to annul the sale, and what would not; still, it seems that where the disproportion is very great—as where a person pretends to sell a term of sixteen years, when, in point of fact, six years only are unexpired, a court of equity, so far from assisting him by decreeing a specific performance, would assist a purchaser in recovering back any deposit the latter may have paid. (*Long v. Fletcher*, 2 Eq. Cas. Abr. 5.) A purchaser cannot be compelled to take an underlease, even with a compensation, where the agreement was for an original lease, although the former wants only a few days of the original term. (*Mason v. Corder*, 2 March, 332.) Nor where he contracts to purchase an estate tithe-free, or with a right of shooting, can he be compelled to complete his purchase, even with a compensation, if it should turn out that the estate is not tithe-free (*Ker v. Clobery*, Chan. 26 March, 1814; *Binks v. Rokeby* (*Lord*), 2 Swanst. 222; *Norfolk (Duke of) v. Worthy*, 1 Camp. N. P. C. 337), or that the right of shooting cannot be conferred upon him.

Where a title can only be made to part of the property sold.—It sometimes happens that where property is sold in lots, a vendor is unable to make a good title to the whole of them, though he can

do so to part, upon which a question has sometimes arisen as to whether a purchaser of these lots can be compelled to complete his purchase as to the lots to which a title can be made, and to receive a compensation by a proportionate abatement of purchase-money for the others; or whether it will afford him a sufficient ground for rescinding the contract altogether.

The rule, however, appears to be, that if a title cannot be made to a lot complicated with and essential to the enjoyment of the rest, a purchaser will be entitled to rescind the whole contract *in toto*, as well at law as in equity. For example, where one agrees to purchase a mansion-house in one lot, and farms and lands in another lot, and no title can be made to the mansion-house, the purchaser would not be compelled to take the farms and lands without the mansion-house. (*Poole v. Shergold*, 1 Bro. C. C. 118; S. C. 1 Cox, 273; see also *Boyer v. Blackwell*, 3 Anstr. 657; *Drewe v. Hanson*, 6 Ves. 657.) In one case, indeed, it seems that Sir Thomas Sewell held that where a man contracted for the purchase of a house and a wharf, he should be compelled to take the house, notwithstanding no title could be made to the wharf, the possession of which, it appeared, was the sole inducement for the purchaser's entering into the contract, his object being to carry on his business there. (See 6 Ves. 678.) But this decision has met with universal disapprobation. Lord Kenyon, when alluding to it (2 Cox, 274), pronounced it to be a determination contrary to all justice and reason; and Lord Eldon has expressed his strong disapproval of it (*Stewart v.*

Alliston, 1 Mer. 26) ; so that it is a decision by no means likely to be followed at the present day. And this equitable construction has even been adopted in courts of law ; for, notwithstanding it is a settled rule of law that the sale of each lot forms a distinct subject-matter of contract (*Emerson v. Heelis*, 2 Taunt. 38 ; *James v. Shore*, 1 Stark. N. P. C. 426 ; *Roots v. Donner* (Lord), 4 B. & A. 77 ; *Dykes v. Blake*, 4 Bing. N. C. 463), still a court of law will permit a purchaser to decline the bargain to all the lots, if no title can be made to such lots as are essential to the enjoyment of the rest. (*Gibson v. Spurrier*, Peake Ad. Ca. 49 ; *Dykes v. Blake*, 4 Bing. N. C. 463.) But from this it must not be inferred that the mere inability of the vendor to make a good title to all the lots will afford a sufficient ground for a purchaser to be off his bargain as to the others. To enable him to do so, he must bring himself within the rule laid down in *Poole v. Shergold*, and shew that the lot or lots to which no title can be made are complicated with, or absolutely essential to the enjoyment of, the rest, otherwise he will be held to his purchase (*Casamajor v. Strobe*, 2 Myl. & Keen, 724), unless he can shew that there was an express understanding that he was not to take any of the lots unless he could have the whole, or he has been misled by a wilful misdescription of the property. (*Dykes v. Blake*, *suprà*.)

Misdescription.—Where the property is wilfully misdescribed in the contract or conditions of sale, the purchaser may rescind the contract, and cannot be compelled to a specific performance with a compensation. (*Stewart v. Alliston*, 1 Mer. 26 ;

Waring v. Hoggart, R. & M. 40; *Norfolk (Duke of) v. Worthy*, 1 Camp. N. P. C. 337; *Vernon v. Keys*, 12 East, 637; *Jones v. Edney*, 3 ib. 285; *Flight v. Booth*, 1 New Cas. 370; *Robinson v. Musgrove*, 2 Mood. & Rob. 92; *Ballard v. Way*, 1 Mee. & Wels. 520; *Dobell v. Hutchinson*, 3 Ad. & Ell. 355; *Dykes v. Blake*, 4 Bing. N. C. 463.) But not, it seems, if the purchaser was aware that the description was a false one; for then, it seems, that not only would a court of equity refuse to interpose in his favour, but he could not take advantage of this misdescription even at law. A fraudulent misrepresentation on the part of a purchaser, by which a vendor has been induced to sell at an undervalue, may afford ground for a vendor to rescind the contract, or, at any rate, would afford a defence to a bill for a specific performance; for a party calling for the aid of a court of equity must come, it is said, with clean hands (*Cadman v. Horner*, 18 Ves. 11); it being a maxim of equity that he that hath committed iniquity shall not have equity. (Francis's Max. 5; 1 Mad. Pract. 404; see also *Harnett v. Yielding*, 2 Sch. & Lef. 553; *Wall v. Stubbs*, 1 Mad. 80; *Shirley v. Stratton*, 1 Bro. C. C. 440; *Oldfield v. Round*, 15 Ves. 11; *Lowndes v. Lane*, 2 Cox, 363.)

Defect in quantity.—A wilful misdescription of the quantity of acres would, it seems, afford a purchaser a ground for rescinding the contract; unless, indeed, he purchased at so much per acre; in which case he would be allowed a proportionate abatement for the deficiency. But a purchaser has been held not to be entitled to an abatement for a deficiency

in the quantity of acres sold, where the particulars described the estate as containing by estimation so many acres, "*be the same more or less.*" (*Winch v. Winchester*, 1 Ves. & Bea. 375.) Still if it should appear that these words were inserted with a fraudulent intent, to cover a deficiency in quantity, and of which the vendor was aware, a court of equity will not permit the words "more or less," or similar expressions, to protect a fraudulent statement of this nature. (*Norfolk (Duke of) v. Worthy*, 1 Camp. N.P.C. 337.) Until the recent enactment, 54 Geo. 4, c. 2, a contract to convey any specific number of acres would have been taken to imply acres so considered according to the custom of the country in which such lands were situate, and not according to the statute measure. (*Some v. Taylor*, Cro. Eliz. 665; *Morgan v. Tedcastle*, Poph. 55; *Floyd v. Bethel*, 1 Roll. Rep. 520.) But now, by the Act above alluded to, where any special agreement shall be made with respect to any measure established by local custom, the ratio, or proportion which every such local measure shall bear to any of the said standard measures, ascertained and specified by that Act, shall be expressed, declared, and specified in that agreement, otherwise such agreement shall be null and void. (Sec. 15.)

Failure of consideration by alteration of the property.—We have already seen that the destruction of the property, subsequent to the agreement and previous to the conveyance, will not release the purchaser, or afford any ground for rescinding the contract (see *ante*, p. 17). But if a vendor, subsequently to entering into the contract, effects any

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material alteration in the property, which is not properly a subject of compensation, the purchaser may rescind the contract; even pulling down a summer-house on the property after the contract was entered into, though no mention of it was made in the conditions of sale, was considered to afford sufficient cause for the purchaser to rescind the contract. (*Granger v. Worms*, 2 Camp. N. P. C. 83.) The act of cutting down ornamental timber will also form sufficient ground for the purchaser to annul the contract; but not the cutting down of ordinary timber, as in the latter instance it will be considered that the consequential injury the purchaser has thereby sustained may be made good to him by pecuniary compensation. (*Magenis v. Fallon*, 2 Moll. 588.)

Inadequacy of consideration.—Inadequacy of price will not, generally speaking, be sufficient to prevent a court of equity from decreeing a specific performance in favour either of vendor (*City of London v. Richmond*, 2 Vern. 421; *Hanger v. Eyles*, 2 Eq. Ca. Abr. 689; *Hicks v. Phillips*, Pre. Cha. 575; *Charles v. Andrews*, 9 Mod. 151; *Lewis v. Leckmere*, 10 Mod. 503; *Saville v. Saville*, 1 P. Wms. 745; *Keene v. Stukeley*, 2 Bro. C. C. 396; *Adams v. Weare*, 1 Bro. C. C. 567), or purchaser. (*Coles v. Tregothie*, 9 Ves. 234; *Burrowes v. Lock*, 10 ib. 470; *Lowther v. Lowther*, 13 ib. 95; *Weston v. Russell*, 13 Ves. & Bea. 187.) But where it has been caused by any fraudulent misrepresentation of the other party, or the grossness of the inadequacy is such as to be of itself evidence of fraud, equity would

not compel a performance in specie. (*James v. Morgan*, 1 Lev. 111; *Dean v. Rastron*, 1 Anstr. 64; *Conway v. Skrimpton*, 5 Bro. P. C. 187; *Buxton v. Cooper*, 3 Atk. 383.) So if a vendor employs puffers at an auction for the purpose of screwing up the price, a purchaser may decline to complete his purchase. (*Howard v. Castle*, 6 T. R. 642; *Wheeler v. Collier*, 1 Moo. & Malk. 113; *Rea v. Marsh*, 3 You. & Jerv. 331; *Crowder v. Austen*, 3 Bing. 368; Selw. N. P. 174.) The rule, however, as to puffing does not, it must be observed, extend to those cases where an owner fairly bids, either by himself or an agent, having previously given notice of his intention to do so. (*Jones v. Edney*, 3 Camp. N. P. C. 383.) Sales by expectant heirs are, with a view to prevent fraud, considered in a different light from sales by other persons. (*Peacock v. Evans*, 16 Ves. 512; *Gowland v. De Faria*, 17 ib. 20.) The heir of a family dealing for an expectancy in that family is distinguished from ordinary cases, and an unconscionable bargain made with him is looked upon as oppressive and pernicious in principle, and therefore to be repressed. (1 Mad. Pract. 118.) On these principles, where a son who, after his father's death, was a remainder-man in tail, sold his remainder at an under-rate, it was set aside. (*Twisleton v. Griffiths*, 1 P. Wms. 310; *Wiseman v. Beake*, 2 Vern. 121.) Still an expectancy may be sold, provided it is sold fairly. (*Nott v. Hill*, 1 Vern. 168; S. C. 2 Cha. Rep. 120; *Barney v. Beake*, ib. 136; *Batty v. Lloyd*, 1 Vern. 141.) And it has also been held that where a reversionary

interest is sold by auction, the purchaser is not bound to shew that he has given the full value. (*Shelley v. Nash*, 3 Maddock, 232.) An eminent writer on equity observes that the tendency of the determinations to render all bargains with expectant heirs very insecure, if not impracticable, seems not to be considered as operating to prevent its adoption and establishment; but that, on the contrary, some judges had avowed that probable consequence, as being to them a recommendation of the doctrine. (1 Mad. Pract. 120, referring to *Peacock v. Evans*, 16 Ves. 514.)

How the right to rescind a contract may be lost.

—Whatever right a party may have to rescind a contract, he may lose that right by his subsequent acquiescence or confirmation. (*Chesterfield v. Janssen*, 1 Atk. 301; see also *Cole v. Gibbons*, 3 P. Wms. 290.) Where, therefore, time forms part of the essence of the contract, that time may even at law be enlarged by the consent of the parties; and in all cases if a party with full information confirms a contract which it was in his power to have rescinded, he will be bound by such confirmation. So, if instead of repudiating the transaction, he continues to deal with the property as his own, it seems that he will be bound, notwithstanding he should afterwards discover a new circumstance of fraud; for that, although it may be considered as strengthening the evidence of the original fraud, will still be insufficient to revive the right of repudiating the contract after it has been once waived. (*Campbell v. Fleming*, 1 Ad. & Ell. 40.) But if the confirmation is not freely given (*Crowe v.*

Ballard, 1 Ves. 215; S.C. 3 Bro. C. C. 117; 2 Cox, 253; 1 Mad. Pract. 122; Ball & B. 217; and see *Cann v. Cann*, 1 P. Wms. 723), or the contract itself founded on fraud or oppression, or the party be distressed or under the influence of the former transaction, and not fully apprized of his rights (*Dunbar v. Tredennick*, 2 Ball & B. 217; and see *Cann v. Cann*, 1 P. Wms. 723), and that his act will operate as a confirmation, a confirmation thus obtained will not debar him of equitable relief and protection. (*Murray v. Palmer*, 2 Sch. & Lef. 486; and see *Crowe v. Ballard*, 1 Ves. 215; S.C. 3 Bro. C. C. 117, 2 Cox, 253; *Roche v. O'Brien*, 1 Ball & B. 319; 1 Mad. Pract. 122; *Coles v. Tregothic*, 9 Ves. 246; *Morce v. Royall*, 12 Ves. 364.)

SECTION II.

REMEDIES FOR BREACH OF CONTRACT AT LAW.

1. *As to the Vendor.*
2. *As to the Purchaser.*

1. *As to the Vendor.*

THE vendor's most usual legal remedy for a breach of contract affecting real property is by action of *assumpsit* for the purchase-money, and where a certain sum is stipulated to be paid by the defaulting party, in the shape of penalty or liquidated damages, he may resort to an action of debt for recovery of the same; and if, as sometimes happens, the parties bind themselves by agreement under seal, the proper remedy will be by action of covenant. Added to these remedies, the vendor, if he has been prevented from selling his property on account of his title having been slandered, he may bring his action on the case for consequential damages. The purchaser's legal remedies are special action on the contract, for money had and received, to recover the deposit; *assumpsit*, or debt, where the parties bind themselves to pay liquidated damages or penalties in default of fulfilling the contract; as also an action of covenant, if the agreement is under seal. Added to these several remedies, he may also maintain an action on the case, in the nature of

deceit, where the vendor has made any fraudulent misrepresentation or concealment, by which he has been deceived as to the true value and nature of the property.

Assumpsit for the purchase-money.—To support an action of *assumpsit* for the recovery of the purchase-money, the vendor must prove a complete and valid agreement within the Statute of Frauds, which agreement must be duly stamped, otherwise it cannot be admitted in evidence, unless it happens that the stamped agreement is in the hands of the opposite party; who, upon notice, refuses to produce it, in which case secondary evidence may be received of its contents. (*Garnons v. Swift*, 1 Taunt. 507; see also *Waller v. Horsfall*, 1 Camp. N. P. C. 501.) The vendor must also prove the performance of all conditions precedent on his part, the defendant's default, and that the plaintiff has a good title to the property contracted for.

All precedent conditions must be performed.—To support this action the vendor must, as I have just before stated, proved the performance of all precedent conditions on his part, or a tender and refusal on the part of the defendant; upon which ground it has been held that a vendor cannot recover in this form of action without having executed the conveyance, or offered to do so; unless the purchaser has discharged him from so doing. (*Jones v. Barklay*, Doug. 684; *Phillips v. Fielding*, 2 H. Black. 123.)

Thus in *Woodrow v. Glazebrook* (6 T. R. 666), where the plaintiff agreed to sell a schoolhouse to the defendant, and to convey the same to him before

the 1st of August, 1797, and to deliver up the possession to him on the 1st of August, 1797, it was held that the plaintiff could not maintain the action for the 120*l.* without shewing that he had conveyed, or tendered a conveyance to the defendant. In *Spiller v. Westlake* (also 2 B. & Ad. 155), where A. covenanted that he would, on or before a certain day, convey land to B. by such conveyance as B.'s counsel should advise, in consideration of which B. covenanted to pay a certain specific sum on the execution of the conveyance, it was holden that A. could not maintain an action against B. for non-payment of the money, without shewing that he had conveyed, or that he was ready at the day to have conveyed, and had done every thing which lay upon him to do for that purpose, but that he was prevented from so doing by some act, omission, or neglect on the part of the defendant. Yet, where the defendant himself prevents such performance, then what the law considers as equivalent to performance will suffice; as, where a vendor tenders a draught of the conveyance to the defendant, and offers to deliver and execute the same to him, but the latter discharges the vendor from so doing. It will be necessary, however, that this should be averred in the declaration, and proved at the trial of the cause; and the refusal, as well as the tender, must be averred and proved. (*Jones v. Barklay*, Doug. 684; *Wilmot v. Wilkinson*, 6 B. & C. 506.) A tender and refusal are deemed equivalent to performance, but a tender without refusal is not so considered. (*Lee v. Exelby*, Cro. Eliz. 888; Selw. N. P. 115, 9th edit.)

Plaintiff must shew that he has a good title.—The plaintiff must also be armed with proof that he has a good title to the property; for it will not be sufficient for him to allege that he has been *always ready and willing*, and frequently offered, to make a good title to the estate on payment of the purchase-money (*Philips v. Fielding*, 2 H. Black. 123; Selw. N. P. 115, 9th edit.), but he ought to aver that he actually made a good title, or a tender and refusal, and he ought to shew what title he has. (*Ib.*) But where the plaintiff alleged in his declaration that he was seised in fee of the lands in question, and that the defendant agreed to purchase *on having a good title*; and then averred that the title to the land *was made good, perfect, and satisfactory* to the defendant it was holden that it was not necessary for the plaintiff to set forth in the declaration all the particulars of his title, and that the averments in the present case were sufficient to enable the plaintiff to call upon the defendant for the non-execution of his part of the agreement. (*Martin v. Smith*, 6 East, 555.)

Evidence of title.—Where the plaintiff produces his title-deeds in support of his title, it is not yet satisfactorily determined whether the fact of execution should be proved by the evidence of the subscribing witnesses. In *Thompson v. Miles* (1 Esp. N.P.C. 185), Lord Kenyon, C. J. ruled that it was unnecessary to call the subscribing witnesses; and he also added that he would never allow parties to be called upon to prove the execution of all the deeds deducing a long title; that such was never mentioned in the abstract, or expected in making

out the title in any case of a purchase, more particularly where possession had accompanied them ; he therefore admitted the deeds without any proof of execution. The contrary was, however, held in *Crosby v. Percy* (1 Camp. N.P.C. 304), and it was there held to be necessary for the plaintiff to prove the execution of title-deeds ; and where a tenant who sold a lease had protected himself by the conditions of sale from being called upon to produce any title prior to the lease, it was held that he was required to prove the execution of the lease itself by calling the attesting witness. The ground of the determination in the latter case seems to have been, that the plaintiff having declared that he was *possessed of a lease*, was bound to prove that allegation in the ordinary manner. (*Laythorp v. Bryant*, 1 Bing. N. C.) And it was also said there was no necessity to decide the point discussed in *Thompson v. Miles* and *Crosby v. Percy*; cases which Parke, J. declared most unsatisfactory. In this uncertain position, therefore, the question still remains. It seems, however, to be settled that if a purchaser has not made an application for the title before the action is commenced, he will not be allowed to set up a want of title in the plaintiff, though the plaintiff could not have conferred it till after the action brought, it having been solemnly adjudged, that if a party sells an estate without having a title, but before he is called up to make a conveyance he gets such an estate as will enable him to make a title, it is sufficient. (*Thompson v. Miles*, *suprà* ; see also *Wilde v. Forte*, 4 Taunt. 336 ; *Bartlett v. Tuckin*, 7 Taunt. 259.)

Defence.—The most common defence to this action is defect of title in the vendor, under which defence equitable as well as legal objections may be taken; nor will the plaintiff be entitled to recover unless he can shew a good equitable as well as a good legal title to the property. (*Elliott v. Edwards*, 3 Bos. & Pull. 181; *Maberly v. Robins*, 5 Taunt. 625.) Nor where the property is leasehold can the vendor sustain this action unless he can shew a good title in his lessor. (*Jouter v. Drake*, 5 B. & Ad. 992; *Scho. N. P.* 180.) Refusal on the part of the vendor to convey will also form a sufficient answer to this action.^(a) Another ground of defence is, that there has been a fraudulent misdescription by the vendor, either as to the extent or value, or in both; or that the property is subjected to burdens and outgoings, or clogged with covenants or conditions not mentioned in the contract or conditions of sale; or that there has been a fraudulent concealment of defects, done with the express view of deceiving a purchaser; or that the property has undergone some material alterations since the contract was entered into, of which no notice has been given to the purchaser, or which has even been unnoticed in the contract or conditions of sale: any one of which circumstances is a bar to the action. So the fact of a life having dropped in the case of a sale of leaseholds determinable on lives, unnoticed

(a) This will not, however, be a sufficient ground of defence to an action for a bill of exchange accepted by the defendant by way of payment, whose remedy in a case of this action must either be by cross action or by filing a bill in equity against the vendor in equity. (*Moggridge v. Jones*, 14 East, 486; see also *Morgan v. Richardson*, 1 Camp. N. P. C. 46; *Selw. N. P.* 166, n. 9th edit.)

by the conditions of sale, will afford sufficient ground for a purchaser to rescind his contract, notwithstanding the auctioneer may have mentioned that circumstance at the time of sale; for the conditions are the terms by which the sale is to be governed, and, as we have already seen, cannot be varied by parol. (*Auté*, vol. i. p. 12.)

Use and occupation.—Where a purchaser has entered on premises under a contract to purchase them, but which contract goes off without any default on the part of the vendor, if such occupation has been a beneficial one, the vendor may maintain an action for such use and occupation (*Hill v. Vaughan*, Peake, N. P. C. 245); but it seems only for the period since the putting an end of the contract. (*Ib.*; and see *Hearne v. Tomlin*, Peake, N. P. C. 192.) Possession delivered to a purchaser upon a treaty for the purchase does not constitute him a tenant to the lessor, as no such implication can arise from circumstances the occurrence of which neither of the parties had in their contemplation. (*Kirtland v. Pounsett*, 2 Taunt. 45.)

When a vendor will be restrained from bringing his action.—When a bill for a specific performance is dismissed for defect of title in the vendor, the Court will generally grant an injunction to restrain the vendor from proceeding by action at law for breach of the contract (*McNamara v. Arthur*, 2 B. & B. 349; 1 Mad. Pract. 136, 2nd edit.); but this will not be granted in every instance; for cases not unfrequently occur, in which, though the Court declines to enforce a specific performance, yet whilst it dismisses the bill, the decree expressly declares

that it shall be without prejudice to the vendor's legal remedy, where it appears to the Court that he really has a legal remedy to resort to.

Action for slander of title.—Besides the legal remedies we have already noticed, a vendor has also a remedy by action against parties who, by slandering his title, prevent him from selling his estate; as by stating that the issue in tail or a person taking lands by descent is a bastard, who, if such were true, would thereby be rendered incapable of inheriting them. (3 Black. Comm. 123; Cro. Jac. 213; Cro. Eliz. 197; *Lowe v. Harewood*, Sir W. Jones, 196; recognized in *Malachy v. Solper*, 3 Bing. N.C. 383; S. C. 3 Scott, 736.) But in cases of this nature it is incumbent on the plaintiff not only to state and prove the speaking of the words, but also the particular injury which he has sustained in consequence; because the words not being actionable in themselves, the special damage sustained must form the gist of the action, which must be alleged, and also proved at the trial of the cause. (*Hargrave v. Le Breton*, 4 Bur. 2422; *Smith v. Spooner*, 3 Taunt. 246; *Pitt v. Donovan*, Mau. & Selw. 369; *Watson v. Reynolds*, 1 Mood. & Malk. 1.) To maintain this action there must be malice, either express or implied (*Hargrave v. Le Breton*, *suprà*); for if a person think he has a right to the property, which in fact he has not, the assertion of that claim, however publicly done, will not support an action of this kind. Thus in *Smith v. Spooner* (5 Taunt. 246), where a person supposing he had a right to recover possession of a term for some misconduct of his tenant,

and hearing that the term was to be sold, went to the auction and said that the vendor could not make a title to it, it was holden that did not afford sufficient ground for an action, there being no proof of malice. Nor is the attorney of a party claiming title to premises put up for sale liable to an action for slander of title, if he, *bonâ fide*, though without authority, makes such objections to the seller's title as his principal, if present, would have been authorized to make. (*Watson v. Reynolds*, *suprà*.)

2. *As to the Purchaser.*

Special action on the contract.—To maintain this action, the plaintiff must prove the contract, and the performance on the part of himself of all conditions precedent; the incapacity or refusal on the part of the defendant to complete the contract; and when he seeks to recover the deposit, that he has actually paid such deposit to the defendant.

Proof of the contract.—This must be shewn by the production of the instrument itself, and the signature of the contracting parties must be proved. The instrument also must, as we have already seen, be duly stamped before it can be received in evidence, unless indeed one part only of it be stamped, and this is in the hands of the opposite party, who, upon notice, refuses to produce it; for then the unstamped part may be received as secondary evidence of the agreement. (*Ante*, vol. i. p. 109.) And notwithstanding the deposit cannot be recovered in this form of action, where the contract cannot be proved, as must always occur in the case of mere parol agreements, the sum actually paid as such

deposit may, nevertheless, be recovered in an action for money had and received. (*Walker v. Constable*, 3 Bos. & Pull. 306.) But the expenses of investigating the title cannot be recovered in any form of action unless a valid contract within the Statute of Frauds can be first established. (*Gosbell v. Archer*, 4 N. & W. 485; Selw. N. P. 177.)

Conditions precedent.—As a general rule, the plaintiff must shew a performance on his part of all conditions precedent, and as it is the duty of the purchaser to prepare and tender the conveyance to the vendor for execution, he cannot maintain this action unless he has either done this, or can shew that his doing so would have been merely nugatory; as for example, where a vendor has incapacitated himself from completing the contract by conveying the property to somebody else (*Knight v. Crockford*, 1 Esp. N. P. C. 190), or is unable to confer a good title to it. (*Roper v. Coombes*, 6 B. & C. 534.) But if a purchaser can prove either of these facts, it will then be unnecessary for him to shew any tender of the conveyance, which, under such circumstances, it would have been both imprudent and improper for him to have made. (*Jarman v. Eggleston*, 5 Car. & Pay. 172; *Hodges v. Lichfield (Lord)*, 1 Bing. N. C. 492.) At the same time it will be incumbent on the plaintiff to prove the title actually bad; for the mere opinion of conveyancers to that effect will be insufficient. (*Camfield v. Gilbert*, 4 Esp. N. P. C. 140.) But a plaintiff cannot at the trial insist upon any objection to the title appearing in the abstract,

which he neglected to take at the time of rescinding the contract, and which might have been removed by the vendor if taken before. (Per Lord Tenterden, C.J. in *Todd v. Hoggart*, 1 M. & M. 128.) Nor will it be sufficient for a plaintiff merely to allege that the defendant, who was to make a good title, had delivered an abstract which was "insufficient, defective, and objectionable; the plaintiff must give a particular of all objections to the abstract arising upon matters of fact." (*Collett v. Thompson*, 3 Bos. & Pull. 246.) But he will not be obliged to give a particular of any of the objections in point of law arising upon the abstract. (*Ib.*) And if a particular is not given, this will not preclude the plaintiff from proving any infraction of the conditions of sale which entitles him to annul the contract. (*Squire v. Todd*, 1 Camp. N. P. C. 292.)

A contract to make a good title means a good title both at law and in equity, and therefore the Court will inquire collaterally whether the title be good in equity. (*Maberley v. Robins*, 5 Taunt. 625.) And where upon a sale there is such a doubt upon the vendor's title as to render it probable that the purchaser's right may become a matter of investigation, the Court will not compel a purchaser to complete the purchase. But in *assumpsit* to recover a deposit on a purchase, upon an allegation that the defendant has failed to make a proper title, the Court will not consider whether the title is of a doubtful description, such as a court of equity would not compel an unwilling purchaser to take, but simply whether the defendant has or has not a

legal title to convey. (*Boyman v. Gutch*, 7 Bing. 379.)

Action may be maintained by personal representatives—When.—Whenever a breach of contract occurs on the vendor's part in the purchaser's lifetime, and such purchaser afterwards dies, his personal representatives, and not the heir, are the proper persons to maintain this action; for it arises on a personal contract, the breach of which causes a loss to the personal estate. (*Orme v. Broughton*, 10 Bing. 533; S. C. 4 Moore & Scott, 417.)

Damages.—The damages which a purchaser may recover against a vendor are the expenses of investigating the title, including the charges for searching for judgments, and for comparing the abstract with the documents therein referred to (*Hodges v. Lichfield (Lord)*, 1 Bing. N. C. 492; *Wilde v. Fort*, 4 Taunt. 341); and also interest on his purchase-money, if he can shew it has been lying dead and unproductive. But in order to enable a plaintiff to recover special damages for the costs of investigating the title, &c. he must lay them as such (*Flureau v. Thornhill*, 2 W. Black. 1078; *Richards v. Barton*, 1 Esp. N. P. C. 268), for he cannot recover them under a count either for money had and received (*Frühling v. Schroeder*, 2 Bing. 77), or, it seems, under a count for money paid to the defendant's use. (*Canfield v. Gilbert*, 1 Esp. N. P. C. 221:.) But a purchaser cannot recover damages for expenses incurred previously to entering into the contract; nor for surveying an estate before he knows the title; nor the costs for a

conveyance drawn by anticipation; nor the extra costs of a suit for specific performance brought by the vendor. (*Hodges v. Lichfield (Lord)*, 1 Bing. N. C. 492; Rosc. Ev. by Smirke, 195.) Neither can he recover any compensation for the fancied goodness of his bargain, where the vendor, without any fraud on his part, is unable to make a marketable title to the property. (*Ib.*; and see *Flureau v. Thornhill*, 2 W. Black. 1078; *Walker v. Moore*, 10 B. & C. 416.) But a purchaser, by recovering the deposit from the auctioneer, will not thereby be precluded from proceeding in his special action against the vendor for the recovery of the interest on such deposit, as also for the expenses incurred in investigating the title.

Money had and received.—This form of action is usually adopted for the purpose of recovering the deposit, or any part of the purchase-money that has been paid to the vendor, who afterwards fails to perform his part of the contract. To maintain this action it will be necessary,—1. That the plaintiff should prove the contract; 2. the payment of the money; and 3. the breach on the part of the defendant.

A plaintiff may recover in this form of action although he should fail in proving a written agreement; for notwithstanding an agreement will be void for passing the property when only by parol, a purchaser under it will still be entitled to proceed for money had and received to recover back his deposit, or any purchase-money paid by him. (*Walker v. Constable*, 1 Bos. & Pull. 306.)

In this form of action, as in the preceding one,

the plaintiff need not tender a conveyance to the vendor where the latter is unable to make a good title, or has debarred him altogether from the power of executing it by previously conveying the property to some other person. And where the vendor is unable to make a good title by the day appointed, it will, it seems, be no ground of defence that the purchaser was not at that time prepared to pay the purchase-money (*Clarke v. King*, 1 Ry. & Mood. 394), for the plaintiff must be prepared to make out a good title on the day when the purchase is to be completed; and if he fails to do so, the purchaser will thereupon be entitled to vacate the agreement, and bring his action for the recovery of his deposit-money. (*Cornish v. Rowley*, 1 Selw. N. P. 178.) Still, in order to maintain this action, he must disaffirm the contract *ab initio*; for if he takes possession under it, he will be considered as having adopted it, and cannot then afterwards disaffirm it by quitting the premises. (*Hunt v. Silk*, 5 East, 449; see also *Cooke v. Munstone*, 1 Bos. & Pull. N. R. 351; *Beed v. Blandford*, 2 You. & Jerv. 278; and see 1 Selw. N. P. 102.)

Auctioneer.—An action may be brought against an auctioneer for the recovery of the deposit where a good title cannot be made, and he does not appear to have paid over the money to his principal. (*Burrough v. Skinner*, 5 Bur. 2659.) And where an auctioneer does not disclose the name of his principal, an action will even lie against him for breach of contract. (*Hanson v. Roberdeau*, Peake, N. P. C. 120; *Simon v. Motivos*, 5 Bur. 1921; *Owen v. Gooch*, 2 Esp. N. P. C. 567.) So, where an

attorney, who was also an auctioneer, received a deposit on property which he had sold by auction, and after queries raised on the title, and before they were cleared, paid over the deposit to his principal, it was held that the purchaser might recover this deposit from the auctioneer, because the latter, as attorney, had notice that the title had not been completed before he paid over the money, and consequently that he had paid the money over in his own wrong. (*Edwards v. Hodding*, 5 Taunt. 815; see further on the duties and liabilities of auctioneers, *antè*, vol. i. p. 51, *et seq.*) But the amount only of the deposit can be recovered from the auctioneer, for he will not be liable to pay interest upon it. (*Walker v. Constable*, 1 Bos. & Pull. 306.)

SECTION III.

REMEDIES IN EQUITY.

By the rules of the common law, every contract or covenant to sell or transfer a thing, if there is no actual transfer, is treated as a mere personal contract or covenant; and, as such, if it is unperformed by the party, no redress can be had, except in damages,—being, in effect, giving the party the election either to pay damages, or perform the contract. (Stor. Eq. 22.) But courts of equity have deemed such a course wholly inadequate for the purposes of justice; and considering it a violation of moral and equitable duties, they have not hesitated to interpose, and require from the conscience of the offending party a strict performance of what he cannot, without manifest wrong or fraud, refuse. (*Alley v. Deschamps*, 13 Ves. 228, 229; *Hamatt v. Yielding*, 2 Sch. & Lef. 553; Tr. Eq. lib. 1, c. 1, s. 5.) This jurisdiction appears to be of very ancient date (1 Mad. Pract. 361), it being referred to in the Year-book, 8 Ed. 4, lib. 4, as then well known and established. (Newl. Contr. c. 6, p. 88.) But whatever may be its origin and antiquity, it is now clearly established that wherever a contract has been entered into by a competent party, and the nature and circumstances are unobjectionable, it is as much a matter of course for a court of equity to decree a specific performance, as it is to give damages at law. (*White v. Da-*

mon, 7 Ves. 30; *Hall v. Warren*, 9 Ves. 605, 608; *Greenaway v. Adams*, 12 Ves. 395.) The right to recover damages at law seems at one time, indeed, to have been the guide for equitable interference, and therefore it has been said the practice was to send a party to law, and if he recovered any thing there by way of damages, the Court then entertained the suit; but if nothing was recovered, the bill was dismissed. (*Dodsley v. Kinnersley*, Ambl. 406; 1 Mad. Pract. 288.) According to Mr. Butler, however, the old practice in courts of equity formerly was, in all cases, first to send the party to law, to ascertain whether there was any remedy there or not. If there was no remedy at law, then equity would interfere. His words are:—"The grand reason for the interference of a court of equity is, that the imperfection of the legal remedy, in consequence of the universality of legislative provisions, may be redressed. Hence, for a length of time after the introduction of equitable judicature into this country, it was thought necessary, that, before equity should interfere, this imperfection should be manifested by the party's previously proceeding at law, so far as to shew from its result, the want of adequacy of legal redress, and his claim for equitable relief. This inflicted upon him two judicial suits, and consequently a double expense. To remedy this grievance it became the practice, particularly from the time in which the seals were intrusted to Lord Cowper, to dispense with the previous legal suit, when the want or inadequacy of the legal remedy was evident." (But. Remin. 39, 40.) And an eminent modern

writer on equity remarks (see *Stor. Eq.* 41), that there is great reason to doubt if the rule ever was generally applied at any former period; for that many cases must always have existed in which damages were not recoverable at law, but in which a specific performance would, nevertheless, be decreed. (1 *Mad. Pract.* 288; *Fonbl. Eq. lib. 1, ch. 1, s. 5*, note *e*; *Ib. lib. 1, ch. 3, s. 1*, note *c.*) The rule, he continues to observe, was probably confined to cases in which the party was not entitled to any remedy at law, and there was no equity to be administered beyond the law. Lord Macclesfield denied the existence of the rule altogether, saying, "Neither is it a true rule which had been laid down by the other side, that where an action cannot be brought at law on an agreement for damages, there a suit will not lie in equity for a specific performance." (*Cannel v. Buckle*, 2 P. Wms. 244.) And accordingly, in the very case then before him he gave relief, although there was no remedy at law. "In truth, therefore," as this learned writer afterwards proceeds to observe, "the exercise of this whole branch of equity jurisprudence, respecting the rescission and specific performance of contracts, is not a matter of right in either party, but is a matter of discretion in the Court; not, indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but upon that sound and reasonable discretion which governs itself, as far as it may, by general rules and principles, but at the same time withholds or grants relief according to the particular circumstances of each particular case, when these rules and prin-

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ciples will not furnish any exact measure of justice between the parties. (Stor. Eq. 44, who refers to 3 Woodes' Lect. 58, p. 466; *White v. Damon*, 7 Ves. 35; *Buckle v. Mitchell*, 18 ib. 111; *Mason v. Armitage*, 13 ib. 37; *Clowes v. Higginson*, 1 Ves. & B. 527; *Moore v. Blake*, 1 Ball & B. 69; *Howell v. George*, 1 Mad. Rep. 9; see also 1 Mad. Pract. 287; 1 Fonbl. Eq. lib. 1, ch. 3, s. 9, n. 1; *St. John v. Benedict*, 6 John. Ch. Rep. 111; *Seymour v. Delancey*, ib. 222.)

Bill for a specific performance.—In proceeding in a court of equity for a specific performance, a bill and suit are prosecuted in the usual way. The bill, when filed on behalf of the vendor, should state how the vendor is seised of the property, whether as owner, trustee, &c. It should then set forth the agreement to purchase (which, if alleged to be in writing, signature will be presumed until the contrary be shewn) (*Rist v. Hobson*, 1 Sim. & Stu. 543); the performance of all conditions precedent mentioned in the contract or conditions of sale to be performed on the part of the vendor, as the delivery of the abstract or the like; the willingness of the vendor to perform his part of the agreement, and the refusal on the part of the purchaser, with the charge of confederacy, unless the defendant is a peer, who is never to be charged with others in combining with the plaintiff to deprive him of his right. (See Rede's Tr. Eq. 40; 1 Eq. Drtsm. n. 2, Hughes's edit.) It then sets out the pretences on the part of the defendant, concluding with the interrogating part, the prayer for specific performance, for the payment

of the purchase-money, with interest, and for *subpoena*, &c. (See the form, 1 Eq. Drtm. by Hughes, No. II. notes 1 & 2.)

Injunction.—Sometimes a vendor files a bill for an injunction as well as for a specific performance. Thus, where a purchaser is in possession of the estate, and there is any reason to apprehend that he may cut down timber or commit any waste upon the property, the vendor may obtain an injunction to restrain him from so doing. But before granting this, the Court will put the vendor upon proper terms, and, in most instances, order him to pay the deposit into court. But this he will not be compelled to do where he on his part is both able and willing to make a good title and conveyance to the estate, which the purchaser improperly refuses to accept. To make an order of this kind would be to enable a purchaser to avail himself of his own wrong, for by his default it is that the vendor retains the deposit without conveying the property. (*Wynne v. Griffith*, 1 Sim. & Stu. 147.)

Purchaser.—Where a bill for a specific performance is filed by a purchaser, after the usual commencement, stating the relation of the parties and the terms of the contract, it usually proceeds to set out the payment of the deposit; the request made to the defendant to convey, and his refusal; the charge of confederacy and pretences on the part of the vendor; concluding with the interrogatories and prayer for specific performance, *subpoena*, &c. .

Requisites to support a bill for specific performance.—In order to support a specific performance of an agreement to purchase real property, it will

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be necessary, in the first place, that such agreement itself should be a valid one, and ought to be in writing, signed by the party to be bound by it, or his lawfully authorized agent; it ought also to be certain, just, and fair in all its parts, and capable of being performed.

Agreement must be a valid one.—Notwithstanding the agreement must be a valid one, the instrument is not arbitrarily restricted to one form only; and therefore, where a contract appears only in the condition of a bond secured by a penalty, the Court will act upon it as an agreement, and will not suffer the party to escape from a specific performance by offering to pay the penalty. (*Logan v. Wienholt*, 7 Bligh. 1; 2 Stor. Eq. 49, referring to *Ensign v. Kellogg*, 1 Pick. 1.) And notwithstanding equity will not, generally speaking, enforce the specific performance of an unwritten contract, still there are circumstances, as we have already seen (*antè*, vol. i. p. 80, *et seq.*), in which equity has departed from the strictness of this rule, as in the instances above mentioned, of a sale before a Master in Chancery, or where the agreement is confessed, or where there has been a part performance of it,—subjects which have been so fully treated upon in a former part of the work as to render a repetition here wholly unnecessary.

Must be certain, just, and fair in all its parts.—A specific performance will never be decreed in cases of fraud or mistake, or of hard and unconscionable bargains; and equity will allow a defendant to resist a bill for specific performance, by shewing that, under the circumstances, the plaintiff is not entitled

to the prayer of his bill. (2 Stor. Eq. 70.) As, for example, that by fraud, accident, or mistake, the thing bought is different from what he intended (*Malins v. Freeman*, 2 Kee. 25, 34), or by shewing that some material terms have been omitted in the agreement (*Joynes v. Statham*, 3 Atk. 288; *Wooliam v. Hearn*, 7 Ves. 211; and see 1 Ves. & Bea. 532; *Mason v. Armitage*, 13 ib. 25; *Costigan v. Hastler*, 2 Sch. & Lef. 166; *Howell v. George*, 1 Mad. Rep. 11; *Flodd v. Finlay*, 2 Ball & Bea. 33; and see 1 Mad. Pract. 405); or that it is unconscientious (*Vaughan v. Thomas*, 1 Bro. C. C. 556), or unreasonable (see 1 Mad. Pract. 405, and cases there referred to), or fraud or surprise (*ib.*; and see *Clowes v. Higginson*, 1 Ves. & Bea. 526; *Townshend (Marquis of) v. Stangroom*, 6 Ves. 328; *Twining v. Morrice*, 2 Bro. C. C. 326); or there has been concealment (*Shirley v. Stratton*, 1 Bro. C. C. 440; *Oldfield v. Round*, 5 Ves. 508), misdescription, or misrepresentation of the property, whether wilful or not, and whether latent or patent (*Cadnam v. Horner*, 18 Ves. 11; *Wall v. Stubbs*, 1 Mad. 81), or any unfairness attending the transaction,—as, for example, drawing a party into it whilst in a state of intoxication. (*Savage v. Taylor*, 234; *Cragg v. Holme*, mentioned in a note to *Cook v. Clayworth*, 18 Ves. 14; and see *Child v. Dambridge*, 2 Vern. 71; *Scott v. Murray*, 1 Ves. 1.) And in every case in which any of these defences are set up, parol evidence will be admitted in support of them (as to which see *antè*, vol. i. p. 88, *et seq.*), and to shew that, under such circumstances, the plaintiff has no right to call for equitable assistance to enforce a

specific performance of an inequitable contract. (*Davis v. Symonds*, 1 Cox, 402.)

The agreement must be capable of being performed. — Incapacity of the vendor to perform the contract will be a sufficient defence to a bill for specific performance of it; consequently, if he has a bad, or even a doubtful title (*Marlow v. Smith*, 2 P. Wms. 198; *Mitchell v. Neale*, 2 Ves. sen. 679; *Shapland v. Smith*, 1 Bro. C. C. 74; *Cooper v. Deane*, 4 ib. 80; *Crew v. Dicken*, 4 Ves. 97; *Rose v. Calland*, ib. 186; *Roake v. Kidd*, ib. 647; *Stapleton v. Scott*, 16 ib. 272; *Wheate v. Hall*, 17 ib. 80; *Sloper v. Fish*, 2 Ves. & Bea. 145; *Price v. Strange*, 6 Mad. 159; *Jervoise v. Northumberland (Duke of)*, 1 Jac. & Walk. 559), or there are any incumbrances the vendor is unable to discharge the property from, the purchaser will never be compelled to complete his purchase. Still, a purchaser will not be entitled to cry off from his bargain on the ground of a bare possibility; consequently, suggestions of old entails, or doubts what issue persons have left, are never allowed to be of sufficient force to found a defence to a specific performance (*Dyke v. Sylvester*, 12 Ves. 126; *Briscoe v. Perkins*, 1 Ves. & Bea. 493); for, in cases of this nature, the Court is governed by a reasonable, probable, and moral certainty; it being next to, if not altogether, impossible, in the ordinary nature of things, there should be an actual mathematical certainty of a good title. (*Hillary v. Waller*, 12 Ves. 239, 252; *Kingsley v. Young*, 7 ib. 473.) When, therefore, the only question in dispute is on the title, it is not usual to bring on the case at once for hearing; but

the Court will, on motion, order a reference to the Master, in which every thing relating to the title may be gone into, and witnesses examined in the same manner as if the reference had been made under a regular decree. (*Woodroffe v. Titterton*, 8 Sim. 238.) And, notwithstanding the defendant by his answer put in issue an objection to the title, and both parties examine witnesses to the point before the hearing, yet, upon a reference to the Master, both parties may produce further evidence before him. (*Vancouver v. Bliss*, 11 Ves. 458; and see *Jenkins v. Hiles*, 6 lb. 646.)

What may be combined with the reference of title.

—It was formerly considered an irregular practice to combine with a reference of title an inquiry at what time a title could be made; such inquiry being the subject of further directions on the report. And the Master's report to the title was required to be obtained before such inquiry could be ordered, equally whether the reference of title was directed under a decree, or by a motion. But although the reference could not embrace an inquiry at what time a title could be made, it seems it might extend to a direction whether it appeared by the abstract that a good title could be made. And after an answer submitting to perform the contract if a good title could be made, a reference was directed upon motion whether a good title could be made, and whether it appeared upon the abstract. But in an anonymous case the then Vics-Chancellor ordered the inquiry whether a title was shewn prior to the filing of the bill to be incorporated in the order of reference, to save expense, and such has since continued to be the practice. (*Smith's Pract.* 494.)

Application for reference for title, how made.—

The application for a reference for title is by notice of motion, which is served on the adverse clerk in court. The order being drawn up and duly passed and entered, a copy of the mandatory part, the abstract of title, or a copy thereof, are left with the Master, together with the written objections to the title. These objections are argued before the Master, either by the solicitors or the counsel of the parties. The Master then makes his report, which if any of the parties are dissatisfied with, they can bring in exceptions, and take objections in the usual way. If the purchaser does not leave the abstract with the Master, the vendor takes out a warrant for him to leave the same; and if the purchaser makes default, then, and not till then, the vendor is entitled to make a copy of the abstract from his draught, and leave it at the Master's office, the expense of which will be allowed him in the costs of the cause. If the purchaser leaves the abstract, the purchaser takes a copy from the Master's office, and not the vendor. (1 Smith, Pract. 495.)

Reference.—The Master, upon a reference of title, is not confined to such evidence only as appears on the face of the abstract, but he may receive further evidence; still, if upon such evidence he reports in favour of the title, the purchaser will be entitled to the costs of the reference. (*Fielder v. Higgonson*, referred to 1 Smith, Pract. 487.) It will not be necessary that the vendor should have a good and perfect title in himself; it will be sufficient if he has the means of procuring the concurrence of the necessary parties to the conveyance, or to perform such acts as will render

such title good; therefore, it cannot be objected that the legal estate is outstanding in an infant or a lunatic, because both those parties are now rendered capable of conveying by special enactments created for that express purpose. And as the recent Act of 8 & 9 Vict. c. 112, renders the assignment of a satisfied term unnecessary, the fact of such term being outstanding will form no ground for exceptions to the Master's report, although it should appear uncertain in whom such term is vested. (*Hemmings v. Spiers*, V. C. Court, Sat. Feb. 13, 9 L. T. 194.) If the Master reports against the title, the Court will dismiss the bill, unless the purchaser should offer to take such a title as the vendor really has it in his power to confer; but the Court will never oblige a purchaser to take an imperfect title, whatever indemnity or compensation the vendor may offer him. When the Master has reported in favour of the title, a motion is made on notice that the purchaser may pay in his purchase-money within a certain time limited by the notice, and the defendant is served with a writ of execution of this order, and on failing to pay in his purchase-money, an attachment is issued against him, and he is proceeded against in the same manner as any other defendant who neglects to perform a decree. (1 Smith, Pract. 497.)

Exceptions.—The Court, in allowing exceptions where the report is in favour of the title, will give the vendor a reasonable time to remove the objection, and this notwithstanding the exceptions and further directions were set down to come on together. (*Portman v. Mill*, 1 Russ. & Myl. 696.) If upon a question of title the Master is satisfied

with the evidence before him, but upon hearing of an exception to the report, the Court considers the evidence insufficient, the Court will, upon the application of the vendor, refer it back to the Master to renew his report, in order to give the vendor an opportunity of producing further evidence. (*Andrew v. Andrew*, 3 Sim. 390 ; 1 Smith, Pract. 496.) If exceptions taken to the report of a good title are overruled, other objections to the title cannot be made ; but if exceptions are allowed, and a new abstract of the title is delivered, further objections may be brought in. (*Brook v. ———*, 4 Mad. 212.) If the Master reports a good title, and the reference has been made under a decree, the cause is set down on further directions, and the order is a declaration that the plaintiff is entitled to a specific performance of the agreement ; and a reference back to the Master is directed to take an account of what is due for principal and interest on the purchase-money, which the defendant is ordered to pay, on the plaintiff executing a proper conveyance of the property ; and in case the parties differ about the matter, the conveyance is to be settled by the Master. (1 Smith, Pract. 497.)

When the bill is dismissed.—When the bill is dismissed on account of the vendor being unable to confer a title, it will generally be without prejudice to any legal remedy the purchaser may have upon the contract (*Crop v. Norton*, 2 Atk. 74 ; *Bennett College v. Carey*, 3 Bro. C. C. 390) ; and the like rule also, generally speaking, prevails where the vendor is plaintiff : still, under certain circumstances, as where the vendor has evidently no title to the property he professed to sell, equity will restrain

him from bringing an action at law upon the agreement. (*Macnamara v. Arthur*, 2 Ball & B. 249.)

Costs.—Costs in equity are always discretionary with the Court, although, generally speaking, they will fall upon the losing party, unless there are equitable circumstances arising out of the case which induce the Court to determine otherwise. As a general rule, where a vendor brings a bill for a specific performance, which is dismissed because he is unable to make a good title, he will be decreed to pay the costs of the suit (*Vancouver v. Bliss*, 11 Ves. 458); and this even where the defect has arisen by accident, as where the title-deeds were burnt after the contract was entered into. (*Bryant v. Bush*, 4 Russ. 1.) But if a purchaser has set up any special matter of defence to a specific performance, as fraud or misrepresentation on the part of the vendor, and such facts are disproved, the purchaser will have to pay the costs of the defence, notwithstanding the bill be dismissed on account of the vendor's inability to make a title. (*Wright v. Howard*, 1 Sim. & Stu. 190.) But a purchaser will not necessarily render himself liable to costs by taking a fair and reasonable objection, although such objection may be overruled, and costs are always allowed where the facts contested are presumed to be in the knowledge of the party that contests them (*Trinity House v. Ryal*, Vin. Abr. tit. "Costs," (Q) Ca. 22; *Cox v. Chamberlain*, 4 Ves. 631; *Staines v. Morris*, 1 Ves. & Bea. 8; *Aislaby v. Rice*, 3 Mad. Rep. 260; *Sharp v. Roahde*, 2 Rose, 192; 2 Mad. Pract. 561), unless the objection has been previously decided in a former cause, and the purchaser had notice of it; for then, it seems,

he would be decreed to pay the costs of the suit. (*Biscoe v. Wilks*, 3 Mer. 456.) Where a vendor is unable to make a good title when the bill is filed, the practice has been to make him pay the costs up to the report of a good title. (*Harford v. Purrier*, 1 Mad. Rep. 532; and see 2 Mad. Pract. 561.) And if the title, though established, is not clear upon the abstract, the Court will decree a specific performance without costs. (*Collinge v. —*, 3 Ves. & Bea. 143, n.; 2 Mad. Pract. 561.) And whenever a bill for a specific performance is dismissed on the ground of misrepresentation, it will be with costs. (*Burton v. Lister*, 3 Atk. 387.) Nor will costs be given where a specific performance of an agreement at a great undervalue is enforced. (*Burroughs v. Lock*, 10 Ves. 476.)

On bills for a specific performance, the Court has sometimes thought it imprudent to give the defendant costs, though there may have been reasonable and weighty objections to the title; because, to give costs is to injure the title he is compelled to take, and in such case the Court has decreed a specific performance without costs. (2 Mad. Pract. 560, referring to *McQueen v. Farquhar*, 11 Ves. 482.) Either party filing a bill for a specific performance contrary to the terms of the contract, will have to pay the costs. (*Williams v. Edward*, 2 Sim. 78.)

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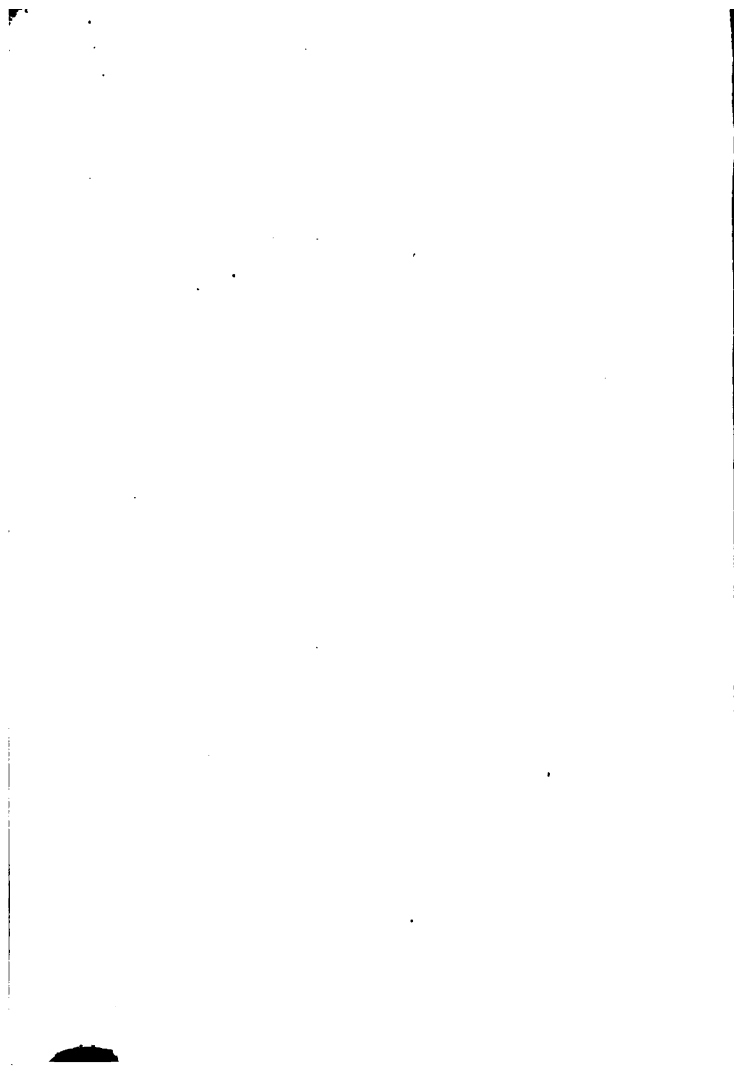
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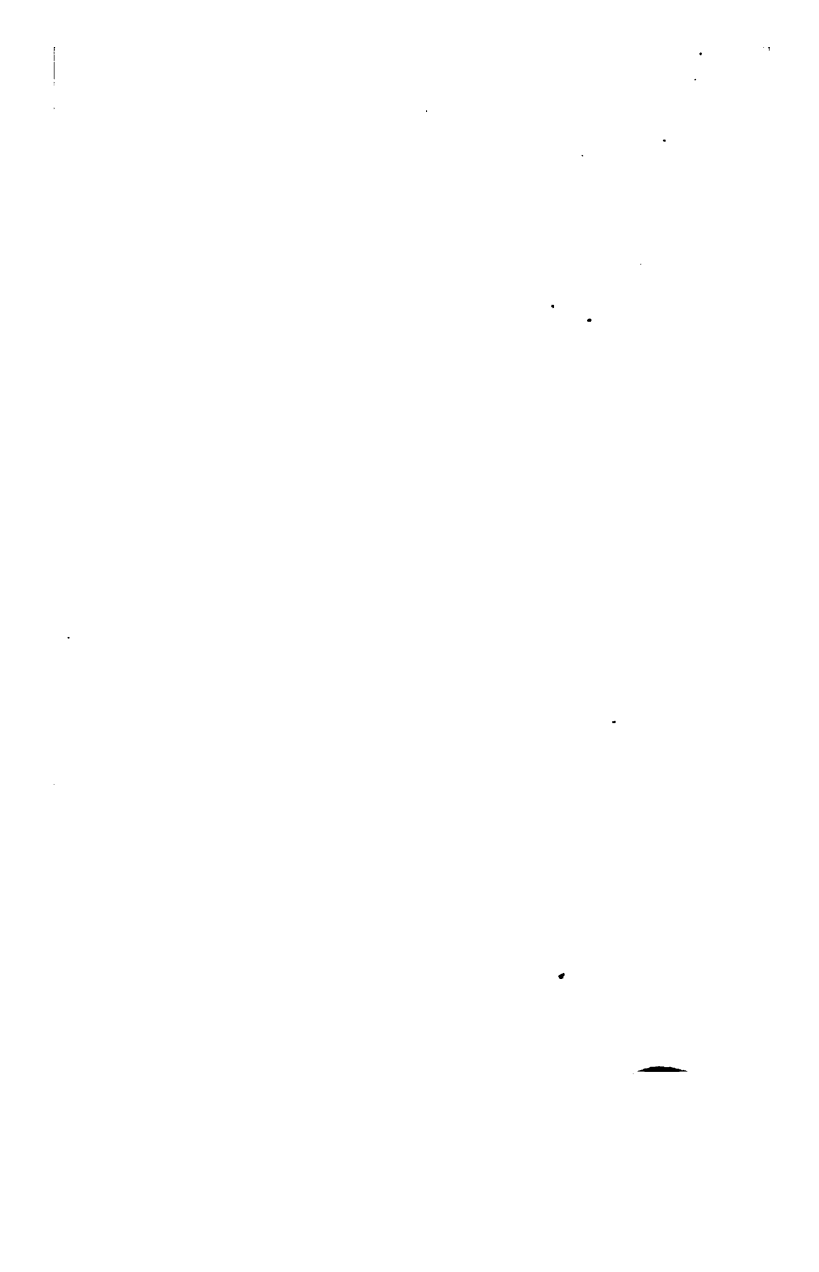
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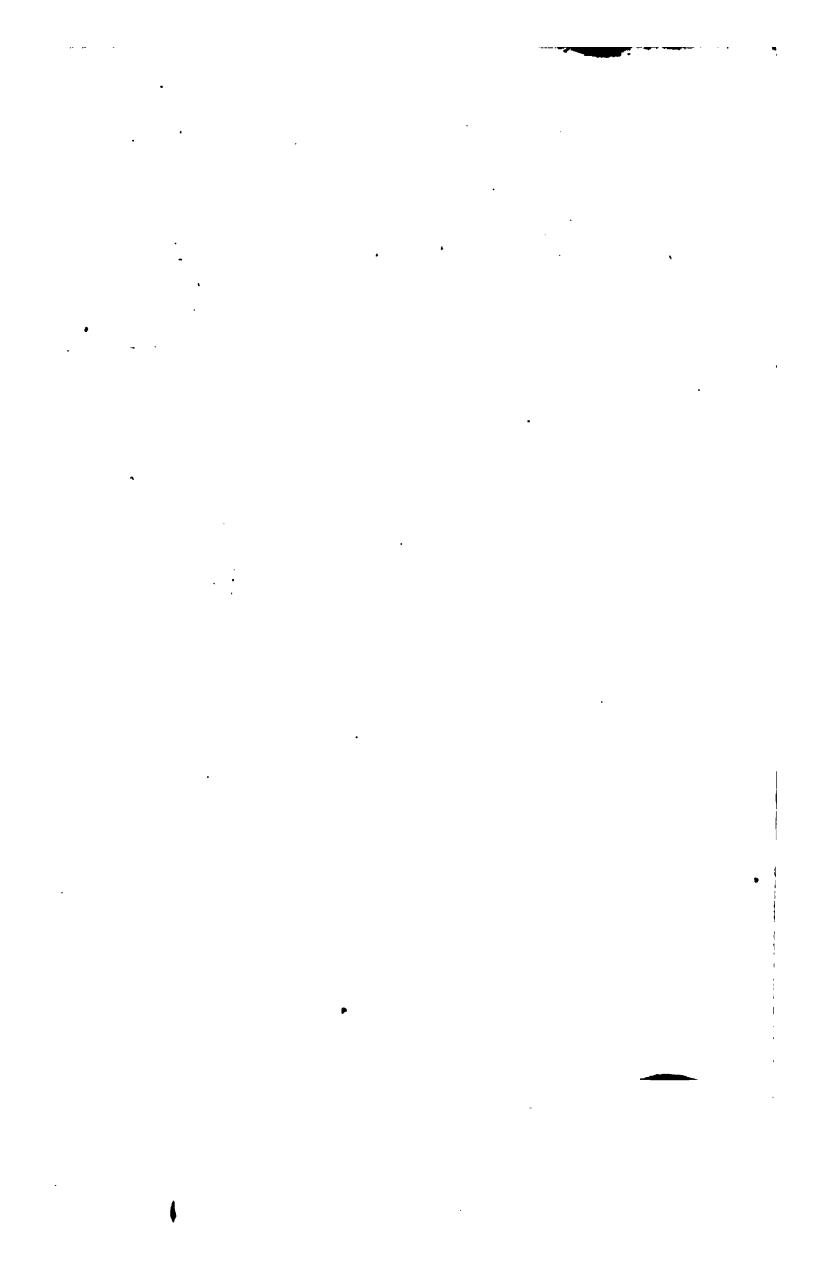
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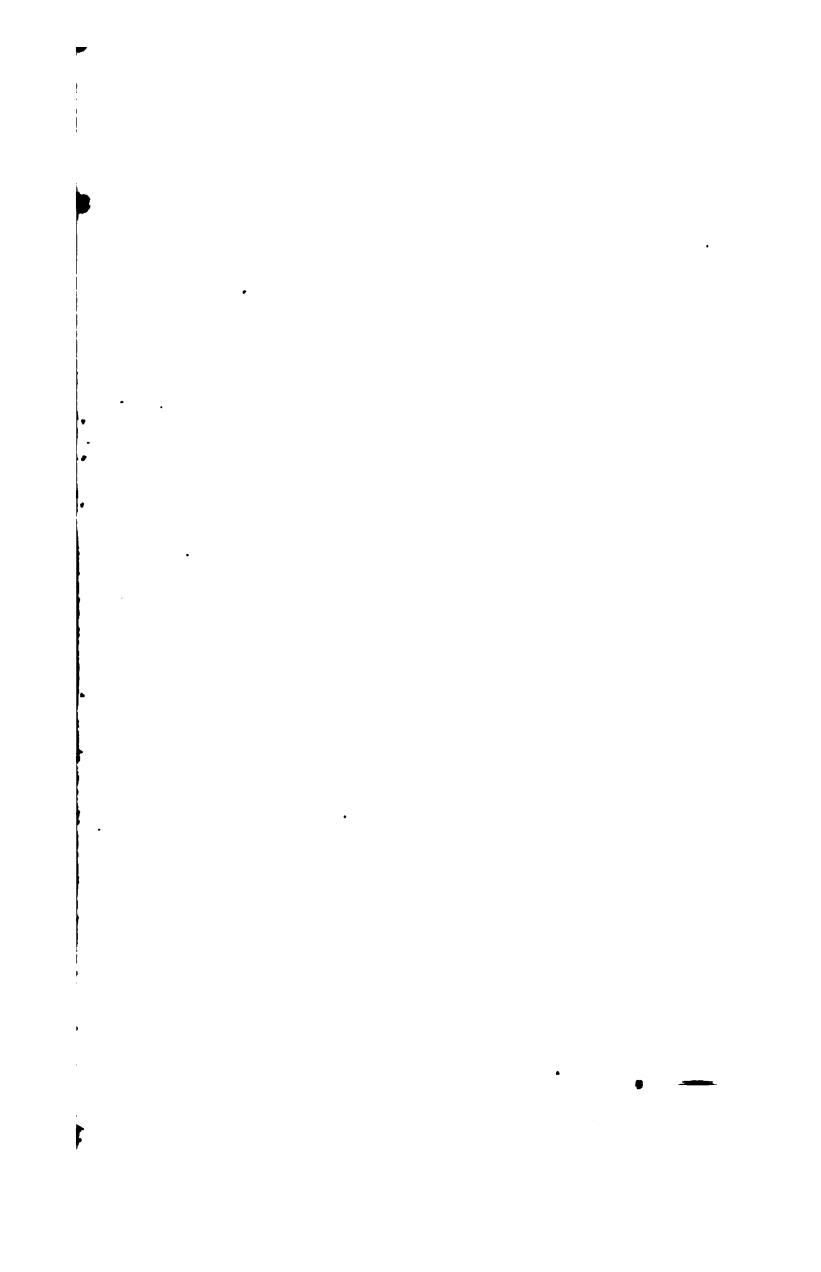


















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